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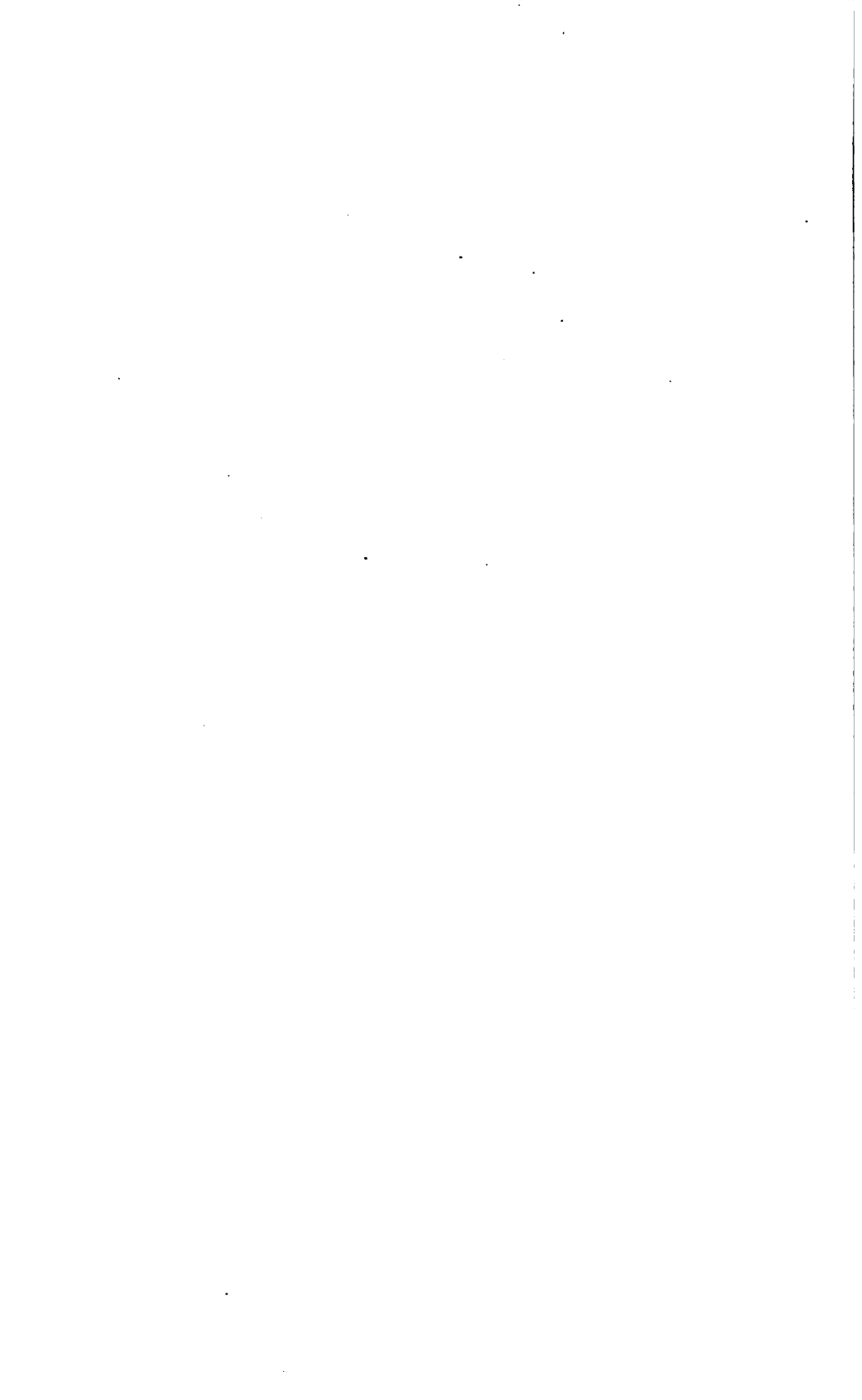
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THE

DAUPHIN COUNTY REPORTS,

CONTAINING

THE DECISIONS OF THE JUDGES OF THE 12TH JUDICIAL DISTRICT, THE DECISIONS OF THE HEADS OF DEPARTMENT OF THE STATE GOVERNMENT AND OF THE PUBLIC SERVICE COMMISSION.

EDITED BY
GEORGE R. BARNETT,
Of the Dauphin County Bar.

VOL. XVII.

HARRISBURG, PA.
WARREN O. FOSTER.
1914.

DEC 8 1920

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THE DAUPHIN COUNTY REPORTS

CONTAINING THE CASES DECIDED BY

Judges of the Twelfth Judicial District of Pennsylvania

AND THE

Decisions of the Departments of the State Government.

CITY OF HARRISBURG *vs.* JESSIE FULLER AND FRANK C. FULLER.

Cities—Paving and curbing—Non-assessable property.

A park owned by a city of the third class, in which it maintains its reservoirs from which it supplies its inhabitants with water, and which is also maintained as a place of public resort and recreation, is non-assessable property; and, under an ordinance providing that the city shall pay for paving and curbing in front of non-assessable properties, the city must pay its proportionate share of the curbing and paving of a street upon which the park abuts.

McGonigle *vs.* Allegheny, 44 Pa. 118, held not to apply to the facts of this case.

A city of the third class caused to be curbed and paved a street upon which a public park fronted, and assessed the entire cost upon the property owners on the side of the street opposite the park. The ordinance authorizing the improvement provided that the city should pay for paving and curbing in front of non-assessable properties. *Held*, on case stated, that the city must pay its proportionate share of the cost of improvement.

Case stated. C. P. Dauphin County, No. 168, September Term, 1913.

City of Harrisburg *vs.* Jessie Fuller and Frank C. Fuller.

Daniel S. Seitz, City Solicitor, for plaintiff.

George R. Barnett, for defendants.

KUNKEL, P. J., December 17, 1913.

By Ordinance No. 26, approved July 6, 1910, and Ordinance No. 78, approved March 19, 1906, the City of Harrisburg authorized the cost of paving and curbing White Hall Street to be apportioned among all the properties fronting along both sides of the street except, *inter alia*, "the cost and expense of paving and curbing in front of non-assessable properties." The assessment for which this action is brought includes a proportionate share of the cost of paving and curbing in front of Reservoir Park, which abuts on White Hall Street. If the park be public property, held or used for public purposes, it is not subject to an assessment for the paving and curbing of the street: *Pittsburg vs. Subdistrict School*, 204 Pa. 635, and Section 3, Act of March 19, 1903, P. L. 41. That it is public property cannot well be disputed. It is owned by the city and is used as a place for maintaining its reservoirs from which it supplies the inhabitants of the city with water, and also as a place of resort and recreation for the public. The assessment, therefore, includes the cost of paving and curbing in front of non-assessable property. But the city, by its Ordinance No. 78 referred to, excepted that part of the cost of the paving and curbing of the street out of the assessment which it authorized to be made against the abutting property owners. Thus there was no authority given to make an assessment which would include the cost of paving and curbing in front of Reservoir Park. The assessment which is charged against the defendants having been made without authority, so much thereof as represents any part of the cost of paving and curbing in front of the park cannot be recovered from them.

Moreover, it is manifest from the ordinance authorizing and providing for the work, that the city intended to assume the cost and expense of paving and curbing in front of non-assessable properties. That it had power to do so is apparent from Article V, Section 2, Clause X, Act of May 23, 1889, P. L. 286. It must have been an inadvertence which led it later to seek to impose upon the properties which abut upon the newly paved street that part of the cost which it had power to pay, which it manifestly intended to pay, and which it made

City of Harrisburg *vs.* Jessie Fuller and Frank C. Fuller.

provision to pay in the ordinances under which the improvement was made. Under the view we have taken of the case, *McGonigle vs. Allegheny*, 44 Pa. 118, is not in point.

In accordance with the stipulation of the parties, judgment is directed to be entered in favor of the defendants.

ADAMS EXPRESS COMPANY *vs.* CITY OF HARRISBURG AND OWEN M. COPELIN, COLLECTOR OF CITY TAXES.

Taxation—Joint-stock companies—Exemption from local taxation.

Exemption from local taxation is limited to public service corporations and such property belonging to them as is indispensable to the accomplishment of their corporate purposes.

The horses of a joint-stock association, engaged in the express business, are not exempt from local taxation.

Demurrer to bill in equity. C. P. Dauphin County, No. 498, Equity Docket.

Thomas DeWitt Cuyler and *Lyman D. Gilbert*, for the plaintiff.

Daniel S. Seitz, City Solicitor, for the defendant.

KUNKEL, P. J., December 17, 1913.

This cause comes before us on a demurrer to the plaintiff's bill. The plaintiff is a joint-stock association, organized under the laws of the State of New York for the purpose of carrying on the business of express forwarding from and between and to any places all manner of parcels, goods, specie, bullion, and other articles and property, animate and inanimate. It is engaged in business within the limits of the City of Harrisburg, making personal delivery of express matter to consignees and collecting outgoing express matter from shippers at their respective residences or places of business. It uses in its business a number of horses which are necessary for the proper conduct thereof.

The defendants are the City of Harrisburg and Owen M. Copelin, Collector of City Taxes. The City of Harrisburg, by virtue of an ordinance duly passed, assessed a tax on certain of the plaintiff's horses, which were used in and were indis-

Adams Express Co. *vs.* Harrisburg, et al.

pensable to the carrying on of its business. Plaintiff having refused to pay the tax, Owen M. Copelin, the collector, attempted to collect it by levying upon and selling the horses. The plaintiff seeks to enjoin the collection of the tax, claiming that the property against which the tax was assessed and out of which the attempt is made to collect it is not subject to local taxation.

By the decisions of our courts, the non-liability for local taxes under general tax legislation has been limited to public service corporations and to such property belonging to them as is indispensable to the carrying out of their corporate purposes. We have not been referred to any authority which goes beyond the doctrine thus stated, nor to any which holds that the property of a joint-stock association doing the business of a common carrier is not subject to local taxation. It is true, such a company is rendering service to the public, but it is not performing a duty which it owes to the public by reason on a special grant from the State. It needs no special grant, nor has it any, to transact its business. It is in no different position from that of corporations generally or of an individual or of a partnership carrying on a similar business. It is not, therefore, performing an obligatory public function, as a corporation does which is dependent upon a special grant from the State for the performance of a service beneficial to the public, with which the taxation of its property by the local authorities would seriously interfere. Out of these considerations arises the freedom from local taxation which is afforded public service corporations. These considerations do not obtain in the case of the plaintiff association: *Carbon Iron Co. vs. Carbon Co.*, 39 Pa. 251; *Lackawanna Iron and Coal Co. vs. County of Luzerne*, 42 Pa. 434; *County of Erie vs. Erie and Western Transportation Co.*, 87 Pa. 434; *Pittsburgh Appeal*, 123 Pa. 374; *Allegheny County vs. Diamond Market*, 123 Pa. 164; *Schuylkill County vs. Citizens' Gas Co.*, 148 Pa. 162.

We are of the opinion that the property in question is liable for the taxes imposed upon it and that the plaintiff is not entitled to the relief which it seeks. Accordingly the demurrer to the bill is sustained. The bill is dismissed at the costs of the plaintiff.

MARY L. GRAUPNER *vs.* GEORGE R. KOENIG.

Wills—After-acquired property.

A testator devised to his wife her heirs and assigns forever, all of his real estate. A description of the real estate he then owned followed the devise. He acquired other real estate and died without changing his will. *Held*, on case stated, that the after acquired real estate passed to his wife.

Case stated. C. P. Dauphin County, No. 527, June Term, 1913.

E. E. Beidleman, for plaintiff.

Arthur H. Hull, for defendant.

KUNKEL, P. J., December 27, 1913.

We think it is clear from an examination of this will that the testator intended thereby to dispose of his entire estate. The will consists of two items. By one item he gives and bequeaths to his wife all his personal estate, goods and chattels, of whatsoever nature and kind. This language needs no statutory help to make it sufficient to pass all the testator's personal property, not only that which he possessed at the time, but also that which he afterwards acquired. By the other item he devised to his wife, her heirs and assigns forever, "all my real estate, consisting of the Robert H. Graupner Brewery and other buildings and grounds belonging thereto, located at the corner of Market, Tenth and Chestnut Streets." The language used is "all my real estate." If the testator had not added "consisting of the Robert H. Graupner Brewery and other buildings and grounds belonging thereto, located at the corner of Market, Tenth and Chestnut Streets," we would have no doubt that the lot in question, which he acquired after the execution of his will, passed to his wife under the devise to her, by virtue of the Act of April 8, 1833, Section 10, P. L. 249, which enacts that "the real estate acquired by a testator after making his will shall pass by a general devise unless a contrary intention be manifest on the face of the will," and of Section 1 of the Act of June 4, 1879, P. L. 88, which provides that "every will shall be construed with reference to real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the

Mary L. Graupner *vs.* George R. Koenig.

testator, unless the contrary intention shall appear by the will." So the question presented is whether the testator intended the words following "all my real estate" to be a limitation on the effect of the general language which he used. In *King vs. George*, L. R. 4 Ch. Div. 435, affirmed on appeal, L. R. 5 Ch. Div. 627, it was said! "..... That the doctrine has been settled that where a testator gives his property generally by the words 'all my property' or 'all my estate' or 'all that I have power over,' as in this case, where he uses words sufficient to pass everything and then proceeds to enumerate particulars, it is now, I think, pretty well settled that the enumeration of particulars does not abridge or cut down the effect of the general words": *Williams vs. Brice*, 201 Pa. 595; *Martin vs. Smith*, 124 Mass. 111; *Graham vs. Knowles*, 140 Pa. 325. It was the evident intention of the testator to give all his estate, both real and personal, to his wife. In the bequest of his personal estate he uses language sufficient to pass all the personal property which he possessed. In disposing of his real estate he uses the phrase "all my real estate" and refers by description and location to his real estate. It appears by the case stated that this real estate was the only real estate which the testator at the time owned, and as a matter of fact he does dispose of all his real estate. He disposes of no residuum. Manifestly he knew that he had no other estate but that which he gave to his wife, and that there was nothing left for disposition which would pass by a residuary clause. We cannot say that after he devised all his real estate to his wife the fact that he proceeded to say of what it consisted, is to be taken as a restriction or abridgement of his general intention to dispose of his whole estate. That which follows the general devise seems to be nothing more than a description or statement of that which at the time constituted his real estate. There is nothing in the will to indicate an intention not to pass the real estate which he should thereafter acquire. On the contrary, as we have seen, the intention to be gathered from the whole will was to make disposition of his entire estate, both real and personal, and to pass it to his wife. Therefore, by the Act of April 8, 1833, the lot in question, which the testator afterwards acquired and of which he died seized, passed to his wife by the provisions of the will. And it passed to his wife by virtue also of the Act of June 4, 1879, if, as directed by that act, the testator's intention to dispose of all of

Mary L. Graupner vs. George R. Koenig.

his real estate is made to speak as if it had been expressed immediately before his death. A similar question arose in *Heck vs. Volz and Hoffman*, 14 N. Y. State Rep. 409, affirmed on appeal in 120 N. Y. Rep. 663, where a will like the one before us was construed. In that case it was held that the real estate acquired by the testator after the execution of the will passed by a general devise of "all my real estate to my wife," although the devise was followed by a specific description, by a reference to recorded conveyances of all the land and property which the testator was known to have owned at the date of the will. (See also *Wambold vs. Scholl*, 11 Mont. L. Rep. 173.)

In accordance with the stipulation contained in the case stated, judgment is directed to be entered in favor of the plaintiff and against the defendant in the sum of \$1,700.

COMMONWEALTH OF PENNSYLVANIA vs. AMERICAN COKE AND
GAS CONSTRUCTION COMPANY.

*Foreign corporations—Bonus on capital stock—Revision of
settlement.*

The Auditor General and State Treasurer cannot revise a settlement for bonus on the capital stock of a corporation made in 1905, by a new settlement made in 1911. If the former settlement is to be revised, it must be done under the provisions of the Act of April 8, 1869, P. L. 19.

Appeal from settlement for bonus on capital stock. C. P. Dauphin County, No. 165, Commonwealth Docket, 1911.

John C. Bell, Attorney General, *William M. Hargest*, Asst. Deputy Attorney General, for the plaintiff.

T. D. Finletter, for the defendant.

KUNKEL, P. J., July 18, 1913.

This is an appeal by the defendant company from the account settled against it for bonus on the increase of its capital employed in this State. It has been submitted to us by the agreement of the parties for trial without a jury, pursuant to the Act of April 22, 1874, P. L. 109. There is no controversy over the facts and they may be briefly stated as follows:

Commonwealth *vs.* American Coke and Gas Construction Company.

FACTS.

Defendant is a foreign corporation with an authorized capital stock of \$400,000, of which \$125,000 has been paid in. It employed in this State, in the year 1905 capital to the amount of \$114,908, upon which a bonus settlement was made on the 24th of April, 1905, and the bonus paid. Alleging that the amount of capital which it employed in the State was greater than that of \$114,908, the Auditor General and State Treasurer, on May 23, 1911, settled the present account against it, in which it is charged with the sum of \$332.91, being a bonus of one-third of one per cent. on an alleged increase of capital of \$99,873. From this settlement the defendant duly appealed.

DISCUSSION.

Upon the trial of the cause no evidence was offered by the Commonwealth in support of its claim that the capital employed by the defendant company in this State had been increased to any amount. The evidence which was offered, instead of going to show that fact, showed, if it showed anything, that the former settlement against the defendant for bonus was erroneous, because made on less capital than was then employed in the State. It is apparent, therefore, that the present settlement is an attempt by the Auditor General and State Treasurer to revise the former settlement. This they have no power to do. If the former settlement is to be revised, it must be done by the authority pointed out by the Act of April 8, 1869, P. L. 19: *Com. vs. Penna. Co.*, 145 Pa. 266.

CONCLUSIONS OF LAW.

We, therefore, conclude:

1. That the Commonwealth is not entitled to recover the amount claimed in the present settlement.
2. That the defendant is entitled to judgment.

Wherefore, judgment is directed to be entered in favor of the defendant and against the Commonwealth, unless exceptions be filed according to law.

EMPLOYMENT OF FEMALES.

Employment of females—Hours of labor—Act of July 25, 1913.

Under Section 3 of the Act of July 25, 1913, P. L. 1024, on days in weeks following holidays, a female may work twelve hours during three days of such week, provided the maximum hours per week do not exceed fifty-four.

Females, under the age of twenty-one years, may be employed after nine o'clock in the evening during the three days in a week in which a legal holiday occurs, provided the maximum hours of employment do not exceed fifty-four, in such week.

Attorney General's Department. Opinion to John Price Jackson, Commissioner of Labor and Industry.

HARGEST, Second Deputy Attorney General, December 18, 1913.

Your favor of the 16th instant, enclosing letter of counsel for F. W. Woolworth Company and also a letter from your chief inspector, was duly received. I understand from these communications that you desire to be advised:

1st. Whether a female over the age of twenty-one years may be employed twelve hours a day in days following holidays, or may only be employed two hours in excess of the regular schedule of hours of employment in the establishment?

2d. Whether a female under twenty-one years of age may be employed after nine o'clock in the evening in days following holidays?

Section 3 of the Act of July 25, 1913, P. L. 1024, provides in part as follows:

"No female shall be employed or permitted to work in, or in connection with, any establishment for more than six days in any one week, or more than fifty-four hours in any one week, or more than ten hours in any one day.

"Provided that during weeks in which a legal holiday occurs and is observed by an establishment, any female may be employed by such establishment during three days of such week for a longer period of the time than is allowed by this act; but no female shall be permitted to work more than two hours over-

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time during any one of such three days, nor more than the maximum hours per week specified in this act."

Section 5 provides as follows:

"No female under twenty-one years of age shall be employed or permitted to work in, or in connection with, any establishment before the hour of six o'clock in the morning or after the hour of nine o'clock in the evening of any day. Provided, That this section shall not apply to females over the age of eighteen years employed as telephone operators."

Section 13 requires a schedule of the hours of labor to be posted in a conspicuous place in the room where the female is employed, or permitted to work.

The language of the proviso of Section 3 is that:

"During the weeks in which a legal holiday occurs and is observed by an establishment, *any* female may be employed by such establishment during three days of such week for a *longer period of time than is allowed by this act*; but no female shall be permitted to work more than two hours *overtime* during any one of such three days, nor more than the maximum hours per week *specified in this act*."

This language seems to refer directly to the time mentioned immediately preceding it in Section 3, that is to say, it refers to six days in any one week, fifty-four hours in any one week, or ten hours in any one day, as the time "allowed by this act."

The fact that Section 13 requires a schedule to be posted for the information of the employees has no bearing upon the provision of Section 3, and I am of opinion that the word "overtime" in the proviso of Section 3 refers to the time fixed in the section, and not to the time fixed in the schedule by Section 13.

Answering the first inquiry, I have to advise you that on days in weeks following holidays a female may be permitted to work twelve hours during three days of such week, provided the maximum hours per week do not exceed fifty-four.

It is a familiar rule in the construction of statutes that the whole statute must be read together, and so read that effect must be given to all of its language, and so that the various sections may harmonize.

A careful reading of the proviso in Section 3 shows that it

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refers to any female. Section 5 prohibits females under twenty-one years of age from working "after nine o'clock in the evening of any day." If this section were construed to prohibit females under the age of twenty-one from working after nine o'clock in the evening, the proviso of Section 3 could not be held to include females under twenty-one years of age, and would have to be construed as if it read "any female under twenty-one years of age." It does not so read. It permits any female to be employed overtime in days following holidays.

Therefore, construing the sections to give as much effect as possible to the language and to harmonize them, I am of opinion, and so advise you, that the law permits females under the age of twenty-one years to be employed after nine o'clock in the evening during the three days in a week in which a legal holiday is observed, provided the maximum hours of employment do not exceed fifty-four in such week.

STATE HIGHWAYS.*State highways—Act of May 31, 1911.*

Under Section 6, of the Act of May 31, 1911, P. L. 468, it is illegal for a street railway company to raise its tracks, laid upon a State highway, without the permission of the State Highway Department.

Attorney General's Department. Opinion to Samuel D. Foster, Chief Engineer, State Highway Department.

BELL, Attorney General, December 2, 1913.

This department is in receipt of your letter of November 21, 1913, enclosing the correspondence with the Central Pennsylvania Traction Company, and printed copy of regulations adopted by your department, governing the erection of poles and the laying of conduits and pipes upon, or in, State highways or State-aid highways.

It appears from the correspondence that the Central Pennsylvania Traction Company desired to raise its tracks where the same run along State Highway No. 140; that permission was requested by the president of that company from your department to raise the tracks; that you advised him that it was necessary that an agreement be signed and a permit given

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before the work could be done; that an agreement was prepared by your department and submitted to the railway company, which objected to certain provisions thereof, and that before the form of the agreement had been agreed upon, the company, without any agreement or permit, proceeded to relay their ties and rails.

It is not clear from the correspondence whether the railway is upon the State highway, or only parallel with it, nor is it clear whether, in addition to laying tracks and ties, the railway company has erected poles.

Assuming that the railway has been laid within the lines of the State highway, I think that it was illegal for the railway company to have gone ahead with the work without your permission, whether the work included the erection of poles concerning which your department has general regulations, or only the laying of tracks concerning which your department has no general regulations.

Section 6 of the State Highway Act of 31 May, 1911, P. L. 468, provides that the roads which are therein designated as State highways "shall be under the exclusive authority and jurisdiction of the State Highway Department, and Section 17 of the same act provides that "no railroad or street railway shall hereafter be constructed upon any State highway..... except under such conditions, restrictions and regulations as may be prescribed by the State Highway Department."

The action of the traction company being illegal, the proper method of procedure is to apply for a mandatory injunction, praying for the removal of the tracks on the ground that they constitute a nuisance. (See Attorney General *vs.* Lombard and South Street Passenger Rwy. Co., 1 Weekly Notes of Cases, 488, 1874.) I advise that such proceedings be instituted forthwith.

LORRETTA S. FEIST, A STOCKHOLDER OF SPAHR, HUTTON & COMPANY, INCORPORATED, vs. FRANK J. SCHAFFNER, RECEIVER OF M. H. SPAHR & COMPANY, INCORPORATED, SPAHR, HUTTON & COMPANY, INCORPORATED, MURRAY H. SPAHR, CHARLES A. HUTTON, GEORGE R. HEISEY, FRANK J. SCHAFFNER AND HEWITT C. MYERS.

Corporations—Transfer of Property—Dissenting Stockholders.

The majority of the stockholders have a right to dispose of the assets of a corporation.

Dissenting minority stockholders have a right to insist on payment of the fair market value of their stock. They are not bound to accept stock of another corporation.

The stockholders of a corporation, at a meeting of which due notice was given, voted to transfer all the property of the corporation to a new corporation about to be organized. Each stockholder of the old corporation was to receive preferred stock in the new company, equal to the amount of his stock in the old company, and common stock of the new company equal to twenty-five per cent. of the amount of his stock in the old company. A stockholder, with notice of the meeting, but who did not attend either in person or by proxy, who received preferred stock in the new company in accordance with the agreement of transfer, but who neither received nor demanded the additional common stock, brought a bill in equity to compel the transfer of the property of the old company to a receiver to be appointed by the court. On demurrer, the bill was dismissed at the cost of the complainant.

Demurrer to bill in equity, C. P. Dauphin, No. 504, Equity Docket.

J. E. B. Cunningham, Samuel M. Clement, Jr., Frank Rogers Donahue, for Plaintiff.

George R. Heisey, C. H. Bergner, for Defendants.

MCCARRELL, J., September 11, 1913.

The bill avers that on September 14th, 1910, the corporation named J. G. Feist & Company, incorporated, was duly created and that its name was on December 4th, 1911, duly changed to Spahr, Hutton & Company, incorporated. The authorized capital of the company was \$250,000.00, and on December 4th, 1911, \$92,000.00 thereof had been issued and was then outstanding. The plaintiff then owned and held 374 shares of

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the par value of \$100.00 each or \$37,400.00 in all. On January 5th, 1912, the regular annual meeting of the corporation was held at Harrisburg in pursuance of notice duly given to the plaintiff and all other stockholders, the notice stating that at the meeting directors would be chosen and such other business transacted as might be presented. The plaintiff did not attend this meeting either in person or by proxy. At the meeting a resolution was duly adopted transferring all the assets of Spahr, Hutton & Company, incorporated, to a new corporation to be organized under the name of M. H. Spahr & Company, incorporated. It was agreed at this meeting by the stockholders present that all the assets of Spahr, Hutton & Company, incorporated, should be transferred to a third party as Trustees, who upon the organization of the new corporation known as M. H. Spahr & Company, incorporated, should transfer said assets to said new corporation. As consideration for this transfer the new corporation was to issue to the stockholders of Spahr, Hutton & Company, incorporated, preferred stock in the new corporation to the full amount of the stock held by the stockholders in the old corporation known as Spahr, Hutton & Company, and in addition thereto stock equal to 25% of the stock held in the old corporation known as Spahr, Hutton & Company. At the time of this meeting, January 15th, 1912, the outstanding capital stock of Spahr, Hutton & Company, was \$5,100.00 of preferred stock of the par value of \$100.00 per share and \$92,000.00 of common stock at the same par value per share. The new corporation, M. H. Spahr & Company, incorporated, was duly created with the authorized capital of \$5,000.00, which was increased to \$150,000.00 and a return of this increase to the proper officer was made September 24th, 1912, with the statement that the increase was made for property. Whether or not the property upon which this increase was based was the assets of Spahr, Hutton & Company transferred in pursuance of the action taken at the meeting of January 15th, 1912, is not distinctly stated in the bill, but the natural inference is that the assets so transferred were made the basis for the increase of capital. The allegation that the bonus tax on the increase has not been paid is apparently irrelevant here. That the majority of the stockholders had the right to dispose of the assets of the company cannot be doubted. On March 15th, 1912, the plaintiff received a certificate for 374 shares of preferred stock in the

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new corporation known as M. H. Spahr & Company, incorporated, and still holds the same. The plaintiff avers that she has not received additional shares to the amount of 25% of her holding of stock in Spahr, Hutton & Company, incorporated, but she does not aver that she ever requested that the same be given her or that it was refused to her. She alleges that all other stockholders received common stock to the amount of 25% of their holding in the old company, and avers that the resolution adopted provided for the issuing of this stock to all the stockholders. So far as appears she did not make any objection whatever to the sale in pursuance of the resolution of January 15th, 1912, until she filed the present bill in March, 1913. She still retains the certificate for 374 shares of preferred stock in the new corporation named M. H. Spahr & Company, incorporated. As already stated, the corporation by vote of a majority of its stockholders had the right to dispose of its assets in the manner indicated by the resolution of January 15th, 1913. As stated by Lowrie, C. J., in *Lauman vs. Lebanon Valley R. R. Co.*, 303 Pa. 47, one member of a corporation cannot "hold all his fellow members with their investment to an unprofitable and impracticable enterprise and prevent them from embarking in another that is more hopeful." Dissenting minority stockholders of course have the right to insist upon being paid the fair market value of their shares, as they are not legally bound to accept the stock of another corporation, and if they promptly proceed can have no difficulty in securing payment of such value. In the present case the plaintiff after she received the certificate for the preferred stock in the new corporation known as M. H. Spahr & Company, incorporated, remained silent for nearly, if not quite a year, without any return or offer to return the stock so received by her. In the meantime, to wit, on September 24th, 1912, a return of the increase of capital stock of the new corporation known as M. H. Spahr & Company, incorporated, was made to the secretary of the Commonwealth manifestly based upon the property and assets procured from the corporation known as Spahr, Hutton & Company, incorporated. The relief sought by the plaintiff is in certain instances not supported by any averment of fact contained in the bill. The bill contains no averment that a Receiver has been appointed by this court for the corporation known as M. H. Spahr & Company, incorporated, and yet the third prayer for relief asks that the Re-

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ceiver so appointed be directed to turn over all the property received by him to a Receiver which the plaintiff asks shall be appointed for the property of Spahr, Hutton & Company.

From the averments of the bill it clearly appears by direct statement and necessary inference that Spahr, Hutton & Company, incorporated, at its annual meeting January 15th, 1912, of which the plaintiff had due notice, voted to transfer its property and assets to a new corporation to be organized under the name of M. H. Spahr & Company, incorporated, in consideration of preferred stock in the new corporation to the full amount of the outstanding shares of the old, and common stock in the new corporation to the amount of 25% of the outstanding shares in the old. Thus the plaintiff became entitled to 374 shares of preferred stock which she has received and holds and to 93.5 shares of common stock of the new corporation. The common stock she has not received nor demanded. It has not been refused her, and apparently she is clearly entitled thereto upon request. This will give her control of the new corporation to the same extent she had of the old, and the bill does not disclose any attempt to defraud her of her rights or treat her in any different way from the other stockholders.

In the light of all the averments contained in the bill we are not satisfied that the plaintiff establishes any right to the relief for which she prays. We therefore sustain the demurrer and dismiss the bill at the costs of the plaintiff.

IN THE MATTER OF THE APPEAL OF JOHN A. BAKER FROM AN ORDINANCE OF THE BOROUGH OF STEELTON, APPROVED NOVEMBER 7, 1910, AND KNOWN AS THE "CURFEW ORDINANCE."

Boroughs—Ordinances—Police power.

A borough ordinance which makes it unlawful for any person under the age of sixteen years to be or remain in or upon the streets, alleys or public places of the borough, after nine o'clock p. m., unless accompanied by parent, guardian or other person having legal custody of such minor person, or bearing a written statement dated that day, signed by parent or guardian declaring that such minor is on an emergency errand, is within the police power of the borough and is valid.

A borough ordinance making it unlawful for any parent, guardian or other person having legal custody of a person under the age of sixteen years, to permit such person to go or be in or upon the streets, alleys or public places of the borough, after nine o'clock p. m., is within the police power of the borough and is valid.

The public is vitally interested in the proper restraint and training of children. If as a means of reforming them after they have fallen into evil ways, they may be lawfully separated from corrupting influences, it must be conceded that the public is interested in preventing them from coming into contact with corrupting influences and improper associates. The police power of the state cannot be exercised in any better way than by seeking to prevent children from becoming the victims of such influences and associates.

Appeal to test validity of borough ordinance. Quarter Sessions of Dauphin County, No. 1½, January Sessions, 1911.

W. B. Boyd and Oscar G. Wickersham, for petitioner.

Frank B. Wickersham, Borough Solicitor, for Borough of Steelton.

McCARRELL, J., May 14, 1912.

It has been agreed that this appeal shall be allowed and that the petitioner shall be recognized as an aggrieved person, having a legal right to appeal from the enactment of the ordinance, approved November 7, 1910, and that the questions raised shall be considered and decided upon their merits, without any technical objections whatsoever.

The first section of the ordinance makes it unlawful for "any person under sixteen years of age to be or remain in or

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upon the streets, alleys or public places in the borough of Steelton at night after the hour of nine o'clock p. m., unless accompanied by a parent, guardian or other person having the legal custody of such minor person, or bearing a written statement dated that day, signed by parent or guardian, declaring that said child is on an emergency errand."

The second section makes it "unlawful for any parent, guardian or other person, having the legal care or custody of any person under sixteen years of age to allow or permit any such child, ward or other person, under such age, while in such legal custody, to go or be in or upon any streets, alleys or public places in said borough after the time prohibited in section one of this ordinance, except as therein provided."

The third and fourth sections then provide penalties and procedure for the enforcement of the ordinance.

The General Borough Act of April 3, 1851, P. L. 320 (Purdon's 13th Edition, 492), grants to such municipalities, *inter alia*, the power "to make such laws, ordinances, by-laws and regulations, not inconsistent with the laws of this Commonwealth, as they shall deem necessary for the good order and government of the borough."

This is a grant of power to enact and enforce all such legislation as may be deemed necessary to secure good order, control and conduct and promote the general welfare. Boroughs are thus given the right to exercise the police power of the State. The extent of this authority has frequently been considered. This power has been defined as the right "vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without not repugnant to the Constitution, as they shall "judge to be for the good and welfare of the Commonwealth and of the people of the same": Cooley on Constitutional Limitations 705; *Commonwealth v. Alger*, 7 Cushing 85; *Commonwealth v. Powell*, 114 Pa. 272.

In *Pittsburgh v. Keech Company*, 21 Superior 548, it is said:

"Much must necessarily be left to the discretion of the municipal authorities and their acts will not be judicially interfered with unless they are manifestly unreasonable, and oppressive, or unwarrantably invade private rights, or clearly transcend the powers granted to them."

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In *Philadelphia v. Brabender*, 17 Superior 335, President Judge Rice uses the following language:

"The limitations of the powers conferred upon municipal corporations are that they must be exercised in a reasonable, lawful and constitutional manner. If these limitations are not transgressed courts cannot interfere with the ordinances of the municipality, for to the mayor and council must be left a reasonable discretion, and for the proper and wholesome exercise thereof they are accountable not to the courts, but to the people: *O'Maley v. Freeport*, 96 Pa. 24. Where the municipal legislature has authority to act, it must be governed, not by our, but by its own discretion, and we shall not be hasty in convicting them of being unreasonable in the exercise of it."

The decision of the Superior Court in this case was affirmed by the Supreme Court in 201 Pa. 574.

In *Sayre Borough v. Phillips*, 148 Pa., in which the validity of an ordinance regulating peddling was considered, Mr. Justice Williams, at page 488, says:

"By the organization of a city or borough within its borders, the State imparts to its creature, the municipality, the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property. The police power is one of these. Ordinances of cities and boroughs, passed in the legitimate exercise of this power, are therefore valid."

In that case the ordinance was declared invalid because it discriminated between persons engaged in peddling, and was not a valid police regulation, but a trade regulation, and, therefore, not a valid exercise of the police power.

In *Dillon on Municipal Corporations*, Vol. 2, Section 586 (5th Edition), the following is stated as the proper doctrine, settled by numerous decisions, to wit:

"When there are both general and special provisions, the power to pass by-laws under the special or express grant can only be exercised in the cases and to the extent allowed by the charter or incor-

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porating acts as respects those matters ; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provision in relation to their various subject matters, but gives authority to pass by-laws reasonable in their character upon all other matters within the scope of their municipal authority, and not repugnant to the Constitution and general laws of the State. And it has very properly been held that a special grant of power to adopt ordinances on enumerated subjects connected with municipal concerns is in addition to the incidental power of the corporation."

In Pennsylvania Railroad Company's Case, 27 Superior 113, Judge Henderson uses the following language:

"Aside from the implied power of the borough, the general welfare clause of the Act of 1851 is broad enough to cover the legislation complained of. The question was discussed in Ridley Park Borough v. Citizens' Electric Light and Power Company, 9 Pa. Superior Ct. 615, where it was shown that the police power of a borough was not limited to the particular subjects named in the twenty-five subsequent sections of the Act of 1851. It was held in the same opinion that the police power of the State, when exercised by a borough or city, has been applied uniformly to both when dealing with the same subjects: Sayre Borough v. Phillips, 148 Pa. 482. It will be found on a careful consideration of the opinion in Millers-town Borough v. Bell, 123 Pa. 151, that that case is not an authority for the appellant's position that the police power of a borough, organized under the Act of 1851, is limited to the subjects specifically declared in the second section of the act. The subject under consideration in that case was the power of a borough to impose an annual license fee on vehicles, and the decision was, that the ordinance was not an exercise of police power but a restraint of trade."

The petitioner in this case asserts that the ordinance is paternalistic; that it is unconstitutional for the reason that it is special legislation in violation of the provisions of Article III, Section 7, of the Constitution of Pennsylvania, and involves a denial of that equal protection of the laws which is guaran-

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teed by the XIV Amendment of the Constitution of the United States to every person within a state.

The objection that it is paternalistic suggests that it is an improper interference with parental authority. We cannot regard it as such interference, but it is rather an attempt to secure the exercise of parental authority by making it unlawful for a parent to permit a child under sixteen years of age to be upon the streets or in public places unattended after nine o'clock p. m. It is merely a direction as to the way in which parental authority shall be exercised in order that the child may be properly trained and not become unfitted for the duties of adult life and service to the community. It is like the direction of the statute which requires parents to see that their children of school age attend school.

In *Ex parte Crouse*, 4th Wharton 9, which was a proceeding by habeas corpus for the release of a child committed to the House of Refuge, Chief Justice Gibson, at page 11, uses the following language:

"The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influences of improper associates. To this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the parent patriæ, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily entrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of

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which, as the government is constituted, cannot be doubted..... In this case the infant has been snatched from a course which must have ended in confirmed depravity; and, not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it."

The public is vitally interested in the proper restraint and training of children, and if as a means for reforming them after they have fallen into evil ways, they may be lawfully separated from the "corrupting influences of improper associates" it certainly must be conceded that the public is interested in preventing them from coming in contact with corrupting influences and improper associates. The police power of the State certainly cannot be exercised in any better way than by seeking to prevent children from becoming the victims of such influences and associates.

Much legislation in many of our states has been adopted in the interest of children, so that they may be properly trained physically, morally and mentally and thus fitted for the duties of adult life. In Pennsylvania we have adopted a compulsory education law, laws prohibiting the employment of minors in certain pursuits, which the legislature has regarded as not calculated to promote their moral or physical well-being, and has more recently enacted the Juvenile Court laws, so that dependent, neglected and delinquent children may be properly cared for and wisely trained. Sales of cigarettes and liquor to minors are forbidden and all these laws have been declared valid.

In *People v. Ewer*, 141 N. Y. 129, in which the validity of a statute of the State of New York making it a misdemeanor for a parent to consent to the employment of a female child under fourteen years of age as a dancer or in a theatrical exhibition or in any exhibition dangerous or injurious to life, limb, health or morals of the child, Mr. Justice Gray, at page 131, thus discusses this important subject:

"This question falls within those which are classified under the head of the police power of the state. To that class of legislation this statute belongs. By preventing the exhibition of children of tender and immature age upon the theatrical or other public stage, the legislature is exercising that right

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of supervision and control over the child, which, in every civilized state, inheres in the government, and which nothing in the legal relation of parent and child should be deemed to forbid. The proposition is undisputable that the custody of the child by the parent is within legislation regulation. The parent, by natural law, is entitled to the custody and care of the child, and as its natural guardian, is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for and that the duties of support and education be performed by the parent, or guardian; in order that the child shall become a healthful and useful member of the community..... Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop..... It is not, and cannot be disputed that the interest which the state has in the physical, moral and intellectual well-being of its members, warrants the implication, and the exercise of every just power, which will result in preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part."

The ordinance under consideration here was passed by the borough authorities in pursuance of the permission of the State to exercise the police power of the State for the good order and general welfare of the inhabitants of the borough. If the means adopted are manifestly related to, and apparently tend to promote the good order and welfare of the community, the court has no right to interfere with the measure which the municipal legislature has enacted for this purpose. The borough council must be presumed to have acted after careful consideration of the entire subject. The members of the council and the chief burgess were undoubtedly familiar with the character of the population of the borough in which they exercised authority. They understood what was necessary for the good order, government and general welfare of its citizens. The purpose falls within the limits of this authority, and unless the provisions of the ordinance are manifestly unreason-

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able and oppressive, or in violation of some undoubted right, we are not permitted to interfere with the legislative discretion of the council and the burgess. We cannot regard the ordinance as special legislation in violation of any provisions of Article V of the Constitution of the State. It seems to us to be clearly an exercise of the police power delegated by the act of assembly under which the borough exists, to the borough council for the preservation of order and the welfare of the community. This conclusion is supported by Freeund on Police Power, Sections 257-260, Cooley on Constitutional Limitations 704, etc., and by many authorities which we have carefully considered.

The McCarver case, 42 L. R. A. 587, is not in real conflict with this conclusion, for there the municipality had not been given authority to exercise the police power, and the ordinance applied to all minors and made its violation a misdemeanor, punishable by indictment.

Is the ordinance in conflict with the XIV Amendment to the Federal Constitution? It has been uniformly held that this amendment does not in any way impair the exercise of the police power.

In Muller v. Oregon, 208 U. S. 411, an act of the legislature of Oregon making it a misdemeanor to permit a woman employed in a laundry to work more than ten hours daily was under consideration. In delivering the opinion of the court, Mr. Justice Brewer, at page 421, uses the following language:

"It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the XIV Amendment to the Federal Constitution, yet it is equally well settled that this liberty is not absolute and extending to all contracts and that a state may, without conflicting with the provisions of the XIV Amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a state may act in this respect we refer to the following cases in which the question has been considered: Allgeyer v. Louisiana, 165 U. S. 578; Holden v. Hardy, 169 U. S. 366."

The people are at present much concerned about the conservation of the material resources of the country, and large

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sums of money are being expended for their protection and conservation. It is fortunate that within the recent past the attention of the people has been turned to the more important subject of preserving and protecting the children of the land from injurious influences and providing them with proper means of physical, mental and moral training, so that they may be conserved and made helpful and useful in adult life to the communities in which they live. The legislation, to which reference has already been made, is designed to accomplish this end. The ordinance under consideration here is of the same character. Thousands of similar municipal enactments have been made in this country with beneficial results. It recognizes the dangers to which children are subject, if allowed at night time to be upon the streets and in public places unattended by adults. It requires parents, in the exercise of the duties which they owe their children, not to permit them to thus go unattended by night to the prohibited places.

In the light of the authorities quoted we cannot regard the ordinance as invalid. We conclude, therefore, that the petitioner has not been aggrieved or deprived of any right by its passage, and his appeal is, therefore, now dismissed at his costs.

COMMONWEALTH v. H. J. BRACONY.

Boroughs—Ordinances—Police power.

An ordinance, entitled an ordinance to secure the purity of certain foods and food products, authorizing the inspection thereof, providing for the licensing of persons dealing therein, prohibiting the offering for sale of any such foods or food products as are impure, unwholesome or adulterated, and providing for the enforcement of the same, is within the police power of a city of the third class, and is not void by reason of containing more than one subject, not clearly expressed in its title, and is not an invasion of the powers of the board of health of the city.

An ordinance, passed in the exercise of the police power of a city of the third class, is not a taxing measure, nor unreasonable, nor does it violate the provisions of the Constitution requiring uniformity of taxes when the fees that may be collected under it are less than the estimated expense of its enforcement.

Every citizen holds his property subject to the police power of the

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State. Property taken or injuriously affected by the exercise of this power is not within the protection of those provisions of the Constitution, providing that property shall not be taken or injured without compensation first made or tendered, or without due process of law.

Summary convictions are not in conflict with the common law right of trial by jury. Summary process, whether civil or criminal, to punish violation of municipal regulations, if according to the usual course of such proceedings, is due process of law.

Appeal from judgment of alderman, for violation of city ordinance. Quarter Sessions of Dauphin County, No. 1, January Sessions, 1912.

Daniel S. Seitz, City Solicitor, for plaintiff.

James A. Stranahan and Fox & Geyer, for defendant.

KUNKEL, P. J., August 12, 1912.

This case comes before us on an appeal by the defendant from a judgment rendered against him in a proceeding before an alderman of the city of Harrisburg for violating Sections 11 and 12 of the ordinance of that city of April 1, 1908, entitled: "An ordinance to secure the purity of certain foods and food products, authorizing the inspection thereof, providing for the licensing of persons dealing therein, prohibiting the sale or offering for sale of any such foods or food products as are impure, unwholesome or adulterated, and providing for the enforcement of the same." Sections 11 and 12 provide as follows:

"Section 11. The milk, dairy and meat inspector shall, on or before the first day of September of each year, receive applications for license from all persons who convey milk in wagons or otherwise, for the purpose of selling the same within the city, said application for license to be renewed annually. He shall also keep a record of the names, residences, places of business, number of wagons or other vehicles used for the delivery of milk, the name and residence of every driver or other person engaged in carrying or selling milk and the number of the license. The license number shall be legibly printed, together with the name of the owner, on each outer side of all wagons or vehicles used in the conveyance

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or sale of milk, in letters not less than four inches in height. He shall also license and register every person selling or offering milk for sale in a store, stand or market place within the city, which license shall be displayed conspicuously in said place of business. The dealer or vendor shall, upon order of the milk, dairy and meat inspector, pay into the city treasury the following sums, viz: Three dollars (\$3.00) for forty (40) quarts or less of milk or cream sold per week. Five dollars (\$5.00) for seventy-five (75) quarts or less of milk or cream sold per week. Ten dollars (\$10.00) for over seventy-five (75) quarts of milk or cream sold per week, receive therefore a receipt, presentation of which at the office of the milk inspector shall entitle him to license; provided, that all of the provisions and requirements of Section 10 of this ordinance have been complied with."

"Section 12. No cased, blown, raised, stuffed, putrid, impure, heated or unwholesome meat, or the meat of an animal that may have died from disease or accident, or which has not been properly slaughtered, bled, dressed and cleaned, shall be sold, held or offered for sale for human food within the city; and no person shall hold, sell or offer for sale for human food the flesh of a calf, pig or lamb under four weeks old, or of a boar over two months old, or of any animal in advanced pregnancy; and all dealers in meat within the city shall pay a license of three dollars (\$3.00) into the city treasury before they begin business and annually thereafter between the first day of April and the first day of June of each year, and no license shall be granted for a fractional part of a year."

And Section 14 declares:

"That any person or persons who shall violate any of the provisions of this ordinance shall be liable to a penalty of not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00) for the first offense, and a penalty of not less than twenty-five dollars (\$25.00) nor more than fifty dollars (\$50.00) for the second offense, and for each offense thereafter not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00). All fines and

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penalties imposed by this ordinance shall be recoverable by summary proceedings before the mayor or any alderman of the city, and all suits or actions at law instituted for the recovery thereof shall be in the name and for the use of the city; and upon recovery thereof, all such fines and penalties shall be paid into the city treasury. In default of the payment of any fine or penalty imposed by the mayor or any alderman of the city under the provisions of this ordinance, the person or persons so offending may be committed to the jail of Dauphin County for a period of not exceeding thirty (30) days."

The ordinance is a police regulation. Section 3 provides for the appointment of an inspector to enforce the regulations of the ordinance. Section 4 prohibits the sale of skimmed milk or milk adulterated with water or other substance as pure milk. Section 5 prohibits the sale of skimmed milk from vessels not marked "skimmed milk" as therein provided. Section 6 prohibits the sale of skimmed milk containing less than nine (9) per centum of milk solids. Sections 7 and 8 prohibit the sale of impure, adulterated or unwholesome milk due to unsanitary premises where the cows are kept, or from the kind of food they are fed, or to tuberculosis or febrile diseases. Section 9 declares that milk of a lower grade and quality than the standard established therein is impure and adulterated. Section 10 directs producers and dealers to furnish the inspector with satisfactory evidence that the milk brought into the city and offered for sale is not impure and adulterated within the meaning of the ordinance, and has been produced by healthy cows free from symptoms of tuberculosis, by cows properly fed and kept on premises in good sanitary condition. By this section the inspector is required to examine each cow, the feed and the conditions of the premises, mark each animal found in a healthy condition, and to exclude from the herd those showing symptoms of tuberculosis. Quarterly examinations are required to be made by the inspector of all places in or outside the city from which milk is supplied to its inhabitants. Section 13 requires the inspector to examine slaughter houses, markets and other places where animals are slaughtered or meats are offered for sale for human food, and to see that they are in a clean and sanitary condition, and if found to be otherwise to revoke the license granted therefor.

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It is not denied that the defendant, between June 1, 1911, and September 1, 1911, sold and offered for sale for human food certain meats and milk within the limits of the city without a license, in violation of Sections 11 and 12 of the ordinance. There is no question of fact therefore raised before us, except that which we decide in paragraph four of this opinion. The validity of the ordinance, however, is attacked. Nine objections are made against it, which are set forth in the petition asking for the allowance of the appeal.

(1) The first objection raises the question of the power of the city to pass the ordinance. There is no merit in this objection. As we have said, the ordinance is unquestionably an exercise of the police power, and was enacted in the interest of the public health. Such power is clearly comprehended in the general power given to cities of the third class by Article V, Section 3, Clause 36, of the Act of May 23, 1889, P. L. 277, which provides: "Every city of the third class is authorized and empowered to enact ordinances to make regulations to secure the general health of the inhabitants and to remove and prevent nuisances." And the power to provide for the inspection of milk sold within its limits is expressly conferred by the Act of April 20, 1869, P. L. 81.

(2) The objection that the ordinance is void because it contains more than one subject which is not clearly expressed in the title, cannot be sustained. The same objection was raised to a similar ordinance passed by the city of Reading, and was overruled, in *Reading City v. Miller*, 45 Sup. Ct. p. 28.

(3) The objection that the ordinance is invalid because it is an invasion of the powers of the board of health of the city as duly constituted by law, is also untenable. A similar objection was passed upon and overruled in *Reading City v. Miller*, supra. The ordinance before us, in Section 13, recognizes the power of the board of health of the city, and its provisions are in no way inconsistent with or interfere with the powers of that board.

(4) The only objections which were seriously urged upon us at the hearing were: that the ordinance was invalid and void because its terms were unreasonable, and because it was in effect a taxing measure for the purpose of raising revenue in excess of the amount required for the actual enforcement thereof. The proof submitted failed to sustain these objections. From the testimony which was offered at the hearing

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it appeared that the fees fixed by the ordinance and possible to be collected under it, fell short of the estimated expense necessarily incident to the carrying out of its regulations and requirements.

(5) The objection against the validity of the ordinance upon the ground that it is a taxing measure and violates the provisions of the State Constitution requiring uniformity of taxes upon the same class of subjects, cannot be sustained. The ordinance is not a taxing ordinance. None of its provisions indicate any intention to collect a tax as such, or to collect from the persons upon whom it operates more than is necessary to carry it into effect. It does not impose a tax. It is an exercise of the police power—quite a different power from the power to tax. The fee is charged for the privilege of engaging in the business of dealing in milk and meats, which the councils in their wisdom thought advisable to regulate in the interest of the health of the community. The business is one which may be conducted in a manner detrimental to the public health; and the fee is exacted of those engaged in it for the purpose of meeting the expenses incident to its proper municipal supervision.

(6) Nor is there any merit in the seventh and eighth objections, by which it is claimed that the ordinance deprives the petitioner of his property without compensation first made or tendered, or without due process of law, or deprives him of his property without the judgment of his peers or the law of the land. It needs no citation of authorities to show that an ordinance enacted by virtue of the police power is not open to any such objection. Every citizen holds his property subject to the police power of the State, and it has been frequently held that property which is taken or injuriously affected by the proper exercise of this power, is not within the protection of those provisions of the Constitution.

(7) Nor was the defendant entitled to a trial by jury, as he seems to intimate by his eighth objection. Summary convictions have always been sustained, and they have never been supposed to be in conflict with the common law right of trial by jury. Summary process, whether criminal or civil, to punish the violation of a municipal regulation, if according to the usual course of such proceedings, is due process: *Rhines v. Clark*, 51 Pa. 96; *Van Swartow v. Commonwealth*, 24 Pa. 131; *Byers, et al., v. Commonwealth*, 42 Pa. 89; *School District*

The Public Service Commission.

v. Pittsburgh, 184 Pa. 156; Dillon's Municipal Corporations, 5th Ed., Vol. II, Sec. 749.

After consideration of all the objections, we are satisfied that the attack upon the ordinance must fail. The judgment of the alderman from which the appeal is taken is therefore affirmed, and the defendant is ordered to pay a fine of ten dollars (\$10.00), the costs of the proceedings before the alderman and of this appeal, and in default of the payment thereof, it is ordered that he be committed to the Dauphin County prison for a period of thirty (30) days.

IN THE MATTER OF PROVIDING DRINKING WATER AND SANITARY DRINKING CUPS IN THE PASSENGER CARS AND AGENCY STATIONS OF THE RAILROAD COMPANIES OPERATING IN THE STATE OF PENNSYLVANIA.

Public Service Commission. General Order No. 1.

BY THE COMMISSION.

And now, January 8, 1914, it is ordered for the accommodation of the traveling public, that all railroad companies engaged in the transportation of passengers within the state, be required to provide a sufficient supply of water for drinking purposes upon each of the cars when engaged in such transportation, together with a sufficient supply of sanitary drinking cups, such as will enable each passenger to have one cup for his individual use.

It is further ordered that an accessible and sufficient supply of water and cups of the same character be provided in each of the agency stations of the roads engaged in such transportation of passengers.

IN THE MATTER OF THE REGULATION OF THE CROSSING OF
FACILITIES OF ONE PUBLIC SERVICE COMPANY WITH
THOSE OF ANOTHER PUBLIC SERVICE COMPANY.

Public Service Commission. General Order No. 2.

BY THE COMMISSION.

And now, January 8, 1914, until otherwise hereafter determined and ordered, any public service company, subject to the provisions of The Public Service Company Law, approved July 26, 1913, before constructing any structures or other facilities across the structures or other facilities of any other public service company, whether underground or above ground or at the same or different levels, in the absence of an agreement between the public service companies affected, shall serve ten days' written notice upon the public service company or companies, whose structures it is so desired to cross, which notice shall specify the nature and character of such contemplated crossing and the exact location thereof, and shall file with the Commission a copy of the notice so served with proof of service thereof.

The public service company or companies desiring to construct such crossings may, after the termination of the period of such notice, proceed therewith in accordance with the specifications contained in the notice unless, within ten days after the service thereof, the public service company or companies affected by such crossing shall serve upon the company or companies proposing to make such crossing and file with the Commission a protest against the construction of the same, or unless without such protest the Commission within ten days of the filing of such notice shall, of its own motion, direct that the crossing shall not be proceeded with.

Such protest shall set forth the reasons which, in the judgment of the protestant, show that the Commission should not approve such crossing, and proof of service thereof, as aforesaid, shall be filed with the Commission within three days of the filing of the protest with the Commission.

The Commission, upon consideration of such notice or protest or both, may fix a time and place for hearing after due notice and determine whether or not such crossing shall be approved. This regulation shall apply to all such crossings between the structures or facilities of any public service company, and the structures or facilities of any other public serv-

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ice company, other than crossings between railroads and street railways and shall be subject to the specific regulations that may hereafter be adopted by the Commission.

PRACTICE OF MEDICINE IN PENNSYLVANIA.*Practice of medicine in Pennsylvania—Prosecutions for violations of acts regulating such practice.*

Any person competent to take an oath in a court of justice is competent to become a prosecutor.

It is preferable that prosecutions for violations of the acts relating to the right to practice medicine in Pennsylvania should be instituted by an agent of the Bureau of Medical Education and Licensure, because if the defendant should be acquitted, there would probably be no liability for costs upon the prosecutor.

Attorney General's Department. Opinion to Dr. John M. Baldy.

BELL, Attorney General, January 13, 1914.

This department is in receipt of your letter of December 30, 1913, enclosing letter from Dr. John A. Hawkins, of the Allegheny County Medical Society, both relative to the right of other persons than the agents of the Bureau of Medical Education and Licensure to initiate prosecutions of persons alleged to have violated the acts relating to the right to practice medicine in this commonwealth.

I understand that the difficulty arises because of the following provision of the Act of 25 July, 1913, P. L. 1220:

"It shall be the duty of the bureau to enforce all the requirements of this act. In case of violation of the provisions of this act, procedure shall be through either the office of the Attorney General of the State of Pennsylvania or by special attorney, or both, at the discretion of the bureau."

The general rule undoubtedly is that "every person who is competent to take an oath in a court of justice is competent to become a prosecutor." *Orlady, J., in Com. vs. Barr, 25 Sup. 609, 1912.*

I do not see anything in the Act of 1913 above quoted which conflicts with this general rule. Nothing at all is said in the Act of 1913 as to the person who shall make the affidavit

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upon which the warrant of arrest shall issue, and in the absence of some provision limiting the making of such affidavit, I should have no hesitation in holding that any person competent to take an oath may make such affidavit. After the prosecution has been begun it may be that the direction thereof may be taken from the district attorney of the county in which the indictment was found, and placed in the hands of the Attorney General, or a special attorney of the Bureau of Medical Education and Licensure, but as this question is not now before us, I do not mean to indicate any decision thereon.

Of course, it would be more prudent to have the prosecutions begun by an authorized agent of the bureau, because if the defendant were acquitted there probably would be no liability for costs upon such a prosecutor. (*Com. vs. Shaffer*, 52 *Sup.* 230, 1912.)

If the prosecutor is not an agent of the bureau, he might not be able in case the prosecution miscarried, to avoid the imposition of costs.

• NOMINATION OF CANDIDATES.

Nomination of candidates—Nomination papers.

The Keystone Party is a political party, and nomination of candidates representing its policies cannot be made by nomination papers.

The word "Keystone" cannot be used in nomination papers at the ensuing general election.

Attorney General's Department. Opinion to Robert McAfee, Secretary of the Commonwealth.

BELL, Attorney General, January 14, 1914.

This department is in receipt of your communication of November 20th, 1913, asking to be advised whether a certain nomination paper presented to you, nominating J. G. Gordon Forster for the office of representative in the general assembly, from the Second Representative District of the County of Philadelphia, should be received and filed by you.

As I understand the facts, this paper is presented under the provisions of the Act of July 9, 1897 (P. L. 223), and by means of this paper it is sought to have the name of the candidate therein mentioned printed upon the official ballot to

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be used at the general election which will be held in November, 1914.

It is stated upon the face of the paper that the electors signing the name are members of the Keystone Party.

The question arises, therefore, whether the members of the Keystone Party in said legislative district are entitled to nominate a candidate for said office by means of nomination papers. Candidates for the office of, inter alia, member of the State House of Representatives, are to be nominated on the third Tuesday of May, 1914, under the provisions of the Act of July 12, 1913 (P. L. 719), popularly known as the "Direct Primaries Act," and the names of those duly nominated will appear upon the official ballot to be used at the general election in November, 1914.

The above mentioned Primary Act provides a comprehensive system for the making of nominations by political parties to elective public offices, but it is provided in the first section thereof, that nothing therein contained "shall prevent any body of electors *not constituting a political party* from nominating candidates by *nomination* papers, as is now or may hereafter be provided by law."

By section 2, political parties in the state and in the counties of the state are defined as follows:

"Any party or body of electors, one of whose candidates at the *general* election next preceding the primary polled in each of at least ten counties of the state not less than two per centum of the largest entire vote cast in each of said counties for any elected candidate, and polled a total vote in the state equal to at least two per centum of the largest entire vote cast in the state for any elected candidate, is hereby declared to be a political party within the *state*; and shall nominate all its candidates for any of the offices provided for in this act, and shall elect its delegates and alternate delegates to the national convention, state committeemen, and also such party officers, including members of the national committee, as its rules provide shall be elected by a vote of the party electors, in accordance with the provisions of this act.

Any party or body of electors, one of whose candidates at either the *general* or *municipal* election preceding the primary polled at least five per centum of the largest entire vote cast for any elected candidate in any county, is hereby declared to be a political party within said *county*; and shall nominate

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all its candidates for office in such county, and in all political districts within said county, or of which said county forms a part, and shall elect such party officers as its rules provided shall be elected therein by a vote of the party electors, in accordance with the provisions of this act."

It is to be noticed that the section just quoted makes a clear distinction between political parties in the state and political parties in a county, in that the vote by which the question of whether a body of electors constitutes a political party in the *state* is to be tested is the vote at the *general* election, next preceding the primary in question, whilst the vote by which the question whether a body of electors constitutes a political party in a *county*, is to be tested, is the vote at *either* the *general* or *municipal* election, preceding the primary in question.

Having regard to the character of the office in question, I am of opinion that the election to be considered in determining whether the Keystone Party is entitled to make this nomination by nomination papers is the general election held in the year 1912.

From the returns of this election on file in your department, it appears that at the general election in 1912 the largest entire vote cast in the state for any elected candidate was cast for Honorable Archibald W. Powell, who was elected to the office of Auditor General, and received, upon all tickets, 621,234 votes, two per centum of which would be 12,425 votes.

At this election Honorable William H. Berry was the candidate of the Keystone Party for the office of State Treasurer, and received at said election, under that particular party name alone, 36,027 votes. It further appears that the said Hon. William H. Berry in each of more than ten counties of the state, received at said election votes to the number of more than two per centum of the largest entire vote cast in each of said counties for the said Hon. Archibald W. Powell.

It therefore follows from an examination of these returns that the Keystone Party had a candidate at the general election in 1912, who polled, in each of at least ten counties of the state, not less than two per centum of the largest entire vote cast in each of said counties for any elected candidate, and polled a total vote in the state equal to at least two per centum of the largest entire vote cast in the state for any elected candidate.

Under the express terms of the said State-wide Primaries

Enforcement of Game Laws on Delaware River.

Act of 1913, these facts constitute the Keystone Party a political party within the State of Pennsylvania, and it must therefore make its nominations in accordance with the provisions of that act and not by nomination papers.

I am further of opinion that the word "Keystone" cannot be used in nomination papers for the ensuing general election. *Savages's Nomination, No. 3, 15 Pa. C. C. 508.*

You are therefore advised to decline to receive or file the nomination paper in question.

ENFORCEMENT OF GAME LAWS ON DELAWARE RIVER.

Game laws—Offenses committed on Delaware River—Hunter's license—Territorial extent.

Under the agreement between the States of Pennsylvania and New Jersey, April 26, 1783, officers of the Game Commission have authority to arrest offenders against the game laws on any part of the Delaware River, whether the offense was committed on the river or within the State of Pennsylvania.

The authority to make arrests on the Delaware River, between the States of Pennsylvania and New York, does not extend beyond the boundary line established September 29, 1789.

A resident hunter's license issued by the State of Pennsylvania, does not give the holder any right to hunt on the Delaware River beyond the boundary line of the state. The right of hunting is not included in the agreement between Pennsylvania and New Jersey.

Attorney General's Department. Opinion to Joseph Kalbfus, Secretary Board of Game Commissioners.

BELL, Attorney General, January 16, 1914.

This department is in receipt of your letter of November 26th, 1913, requesting an opinion regarding the right of the Game Commissioner to enforce the game laws on the Delaware River.

Your first question refers to the right to make an arrest on this river for an offense committed within the State of Pennsylvania.

In the case of an offense committed within the State of Pennsylvania, you are advised that the agreement between Pennsylvania and New Jersey made April 26, 1783, and approved by the General Assembly of Pennsylvania September

Enforcement of Game Laws on Delaware River.

20, 1783 (11 Statutes at Large, page 151), permits an arrest of the criminal to be made on any part of the Delaware River between these two states. The second paragraph of that agreement provides:

"Each state shall enjoy and exercise a concurrent jurisdiction within and upon the water, and not upon the dry land, between the shores of said river."

And further provides:

"All capital and other offenses, trespasses or damages committed on said river, the judicial investigation and determination thereof shall be exclusively vested in the state wherein the offender or person charged with such offense shall be first apprehended, arrested, or prosecuted."

While the second provision applies only to offenses committed "on said river," the portion of the agreement first quoted confers upon the states' concurrent jurisdiction, without limiting such jurisdiction to offenses committed on the river. The officers of the Game Commission, therefore, would have a right to arrest offenders upon any part of the Delaware River, whether the offense was committed on the river itself, or within the State of Pennsylvania.

So far, however, as the right of jurisdiction over the Delaware River where it forms the boundary between Pennsylvania and New York is concerned, there is no agreement between the two states whereby either ceded to the other any jurisdiction over the river. The boundary line between the two states was established by the Act of 29th September, 1789 (13 Statutes at Large, page 378), but that agreement expressly declared that the boundary line therein provided for shall be "the true and just line of boundary and partition both of territory and *jurisdiction* between the State of Pennsylvania and the State of New York, and that this Commonwealth of Pennsylvania doth not nor at any time hereafter shall or will claim to have, hold or exercise any right, power, or jurisdiction in or over the soil or inhabitants dwelling northward of the said line hereby established, eastward of the said meridian line, or western boundary line of New York."

The authority of your officers, therefore, to make arrests on the Delaware River between Pennsylvania and New York, does not extend beyond the boundary lines established by the agreement referred to.

In answer to your second inquiry, viz: "How far toward

Commonwealth vs. Lake Shore and Michigan Southern Railway Co. the New Jersey shore on the Delaware River would a person holding a resident hunter's license in Pennsylvania have authority to hunt," you are advised that a resident hunter's license issued by the public authorities of this state does not give the holder any right to hunt beyond the boundary line between the two states. The above mentioned agreement between Pennsylvania and New Jersey does not give any rights of this kind to the citizens of the adjoining states. The agreement does declare that the river Delaware "is and shall continue to be and remain a common highway equally free and open for the use, benefit, and advantage of the said contracting parties." The right of hunting is not included in this right of way which the agreement provides for, and, in the absence of an agreement with the State of New Jersey to that effect, the state is limited in conferring licenses to hunt to the boundary of the state.

COMMONWEALTH OF PENNSYLVANIA vs. LAKE SHORE AND
MICHIGAN SOUTHERN RAILWAY COMPANY.

Corporations—Capital stock—Taxation.

When a railway company owns and operates lines in Pennsylvania and in other states, the amount of its capital stock taxable in Pennsylvania is indicated by the ratio of the mileage in Pennsylvania to its entire mileage.

Stocks and bonds belong to that kind of property which follows the person of the owner, and it makes no difference where they may physically be. Their situs for taxation is the domicile of the owner, and in the case of a railway company operating lines partly within this state and partly without, its domicile is in this state, so far as concerns the proportion of its capital stock taxable here.

In determining the value of the capital stock, taxable in this state, of a railway company operating lines partly within this state and partly without, there should be deducted from the value of the entire capital stock, as appraised for taxation, the value of real estate owned by the company situated outside of this state and not constituting part of the company's system during the tax year, and the value of stocks of corporations held by the company which are subject to tax on capital stock and on which such tax has been paid.

In this case the president and secretary of the corporation appraised its capital stock, for the purpose of taxation, at \$112,500,000. The ac-

Commonwealth vs. Lake Shore and Michigan Southern Railway Co. counting officers appraised it at \$125,000,000. The court sustained the appraisement of the accounting officers.

Appeal from settlement for tax on capital stock. C. P. Dauphin County, No. 552, Commonwealth Docket, 1909.

Wm. M. Hargest, Assistant Deputy Attorney General, for Commonwealth.

Olmsted and Stamm, for defendant.

KUNKEL, P. J. February 17, 1914.

This is an appeal by the defendant company from the settlement of an account against it by the accounting officers of the commonwealth for tax on its capital stock for the year 1908. It has been submitted to us for trial without a jury, pursuant to the Act of April 22, 1874, P. L. 109. The facts in the case are not in dispute and we find them to be as follows:

FACTS.

The defendant company is the result of sundry mergers of corporations of Illinois, Indiana, Michigan, Ohio and New York, and into it were merged by authority of the statute of March 24, 1865, P. L. 49, certain Pennsylvania corporations owning a railroad running from the New York and Pennsylvania state line through the county and city of Erie to the Pennsylvania and Ohio state line. Thus it owns and operates, and did in 1908 own and operate, an extensive system of railroads in the states of Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York, having a mileage of 1165.25, of which 49.23 are in Pennsylvania. Its main line extends from the city of Buffalo, in the state of New York, to the city of Chicago, in the state of Illinois. It enters Pennsylvania at the New York and Pennsylvania state line and crosses through the city and county of Erie to the Ohio state line. The defendant has no extensive or costly terminals at Erie or at any other point in Pennsylvania, but does have costly terminals and stations at many points upon its system of railroads outside of Pennsylvania.

It owned in 1908 real estate not connected with or constituting part of its system of railroads in the states of Ohio, Indiana, Illinois, Michigan and New York, of the value of about \$1,750,000. It also owned in 1908 stocks of other companies of the value of \$88,355,058.32, and bonds of other companies

Commonwealth vs. Lake Shore and Michigan Southern Railway Co. of the value of \$2,145,265.48. Of the stocks so owned \$50,-515,550.89 represented shares of stock in corporations incorporated by or owning property and doing business in Pennsylvania, and subject to, and actually paying in their own name, taxes upon their capital stock. During the year 1908, the defendant also leased and operated three other railroads wholly outside of Pennsylvania, totaling 220.23 miles in addition to the 38.13 miles of the Mahoning Coal Railway, and the equipment used upon these leased roads, having mileage of 342.47, is all owned by the defendant company. The stocks and bonds of other companies owned by it during the year 1908 were in the custody and keeping of its treasurer in the city and state of New York, where he was resident and his office was located, and none of them was at any time since physically within the state of Pennsylvania. The defendant held them as investments independently of and separate and apart from its railway. It also had cash and current assets of \$45,961,-584.60, no part of which was at any time in the state of Pennsylvania, with the exception of a small account in bank at Erie.

On the 15th day of December, 1908, the defendant company filed its report for taxation on its capital stock with the Auditor General, in which its president and secretary appraised the capital stock of \$50,000,000, divided into 500,000 shares of the par value of \$100 each, at its actual value in cash as it existed between the 1st and 15th days of November, 1908, and returned the same to the Auditor General as of the value of \$225 per share, or \$112,500,000 in the aggregate. The accounting officers, not being satisfied with this appraisement and valuation, themselves appraised the capital stock at \$125,000,000, which is equivalent to \$250 per share, and applying thereto the mileage basis or fraction $49.23/1165.25$ arrived at \$5,281,055 as the proportion taxable in Pennsylvania, on which proportion, on June 18, 1909, an account was settled against the defendant company, charging it with a tax of \$26,405.27, of which the defendant, on July 9, 1909, paid into the state treasury \$16,000 and filed the present appeal from the remainder of the claim.

There was no sale of defendant's stock during the year 1908. Almost the entire amount thereof had been purchased prior thereto by the New York Central and Hudson River Railroad Company, a corporation of the state of New York, at \$200 per

Commonwealth *vs.* Lake Shore and Michigan Southern Railway Co. share, paying for it its own three and one-half per cent. interest bearing bonds, which are valued and ordinarily sell at about ninety cents on the dollar. The defendant had a funded debt of \$150,400,000, bills payable of \$1,307,769.92, and other liabilities of \$6,102,879.81. Over and above its other indebtedness and other liabilities, it had a profit and loss account of \$20,611,418.30, making its book value \$70,611,418.30. The defendant paid dividends during the year 1908 aggregating \$7,000,000, equal to fourteen per cent. on its capital stock. The dividends exceeded its net earnings, which amounted to \$6,633,349.01. It expended in betterments in that year \$3,098,492.04. In arriving at its net earnings or income there are included \$5,716,419.66 of income which was derived from interest and dividends upon the stocks and bonds held by it in other corporations.

DISCUSSION.

The defendant complains of the increased appraisalment of its capital stock by the accounting officers of the commonwealth. The statute provides that "The president, chairman, secretary and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less however than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund"; and provides also that in case the Auditor General and State Treasurer are not satisfied with the appraisalment and valuation so made, they are authorized and empowered to make a valuation based upon the facts contained in the report of the company, or upon any information within their possession, and to settle an account on the valuation so made by them for the taxes.

After a fair consideration of all the information regarding the condition of this defendant company, which is to be gathered from its report, showing gross income from earnings, interest upon investments, rentals and other sources of \$45,583,404.26, net earnings of \$6,633,349.01, its funded and other indebtedness of \$151,707,769.92, its dividends declared and other matters proper to be taken into account in ascertaining

Commonwealth vs. Lake Shore and Michigan Southern Railway Co. value, we are not prepared to say that the appraisement made by the accounting officers is incorrect. Accordingly we find the value of its capital stock to be \$125,000,000.

The defendant contends that the appraisement includes the value of stocks and bonds owned and held by it in the city of New York, and that these stocks and bonds being physically outside of the state are beyond the jurisdiction of this state to tax them. We do not accede to this contention. Stocks and bonds belong to that kind of personal property which follows the person of the owner, and it makes no difference where they may physically be. Their situs for taxation is the domicile of the defendant, which is this state so far as concerns the proportion of its capital stock taxable here. *Com. vs. Curtis Pub. Co.*, 237 Pa. 333; *Cooley on Taxation*, 3d ed., 8687 and notes.

The valuation is also represented by stocks held and owned by the defendant of certain corporations which are subject to and have paid the capital stock tax. The stocks of these corporations are not taxable again in the hands of the defendant. Having contributed to the valuation, their value must be deducted. *Act of June 8, 1891 (P. L. 229)*, *Com. vs. Fall Brook Coal Co.*, 156 Pa. 488; *Lehigh C. & M. Co.*, 162 Pa. 603. The defendant is also entitled to a deduction from the amount of its appraisement on account of the real estate situated outside of Pennsylvania and not connected with or constituting part of its railroad system, of the value in 1908 of \$1,750,000. *Com. vs. L. S. and M. S. Ry. Co.*, 3 Dau. Rep. 172.

We see no reason for departing from the practice which has always been applied to this company and companies of like character in ascertaining the proportion of capital stock taxable in this state. After making the deductions above set forth, the proportion of capital stock taxable in this state is to be determined by the application of the mileage basis or the fraction of $49.23/1165.25$.

CONCLUSIONS OF LAW.

We therefore conclude:

1. That part of the defendant's capital stock represented by its stock and bonds, held and owned by it in the city of New York and physically outside of this state, is subject to the capital stock tax.

2. That part of the defendant's capital stock which is repre-

Commonwealth *vs.* Lake Shore and Michigan Southern Railway Co. sented by stocks held and owned by it of corporations which are subject to and have paid the capital stock tax is not taxable.

3. That part of the defendant's capital stock which is represented by real estate situated outside of Pennsylvania, and not connected with or constituting part of its railroad system, is not subject to the capital stock tax.

4. The proportion of the defendant's capital stock taxable in the state of Pennsylvania is to be determined by the application of the mileage basis.

In accordance with the conclusions stated, the following statement represents the value of the capital stock for taxation, the deductions allowable, the proportion of the capital stock taxable in Pennsylvania at the rate of five mills, the amount of tax due and the payment made by defendant on account thereof.

Value of the capital stock for taxation, . . .	\$125,000,000 00
Value of real estate situated outside of Pennsylvania and not connected with or constituting part of defendant's system during the year 1908, ...	1,750,000 00
	\$123,250,000 00
Value of the stocks of certain corporations held and owned by the defendant,, which are subject to and paid the capital stock tax, ...	50,515,550 89
	\$72,734,449 11
Proportion of capital stock taxable in Pennsylvania, as per mileage basis or fraction 49.23/1165.25, ...	\$3,072,917 00
Tax due on proportion taxable in Pennsylvania at the rate of five mills, ...	\$15,364 58
Credit to amount of tax paid, ...	16,000 00

Wherefore, judgment is directed to be entered against the commonwealth and in favor of the defendant.

COMMONWEALTH, EX REL. M. HAMPTON TODD, ATTORNEY
GENERAL, vs. TRADERS AND MECHANICS BANK OF PITTS-
BURGH.

*Collateral security—Application to indebtedness, other than
that evidenced by the note with which it was deposited.*

Three persons owning an equal number of shares of the stock of a corporation desired to procure a loan at a bank. Two of the number assigned, without limitation, their shares to the third, who executed a note in his own name for the amount of the desired loan and deposited as collateral security for the payment thereof, and for the payment of all other debts due, or to become due or thereafter contracted by him, the stock thus assigned. The president of the bank knew that the stock had originally been held by the persons desiring the loan, in equal shares. but there was no testimony showing that the stock assigned to the maker of the note was not to be used for any other purpose than the securing of the payment of the indebtedness evidenced by the note. There was no suggestion that anything had been omitted from the assignments of the stock by fraud, accident, mistake. Held, that the stock pledged was liable for other indebtedness of the pledgor, in addition to that evidenced by the note with which the stock was deposited.

Rule to show cause. C. P. Dauphin County, No. 23. Commonwealth Docket, 1908.

*John Fox Weiss, James T. Buchanan, Burleigh & Challener,
for Charles F. Kirschler.*

Lyon & Hunter, for W. C. Hagan.

McCARRELL, J., March 10, 1914.

This rule was granted upon the petition of William C. Hagan, who represents that he is the owner of 37 shares of the common stock of the Standard Ice Company, and 37 shares of the preferred stock of the same company, held by the receiver of defendant as collateral security for certain indebtedness. The petitioner avers the stock so claimed by him is held by the defendant company only as collateral security for the note of Charles A. Muehlbronner for the sum of \$4,000.00, and he asks that the receiver be directed upon payment of one-third of the amount of said note and its accrued interest by him, to exhaust the other collateral pledged as security

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for said note before selling or utilizing any part of the stock so claimed by him, as above stated.

The note held by the receiver is a renewal of a note dated May 21st, 1906, signed by Charles A. Muehlbronner for the sum of \$8,000.00. This note was discounted in pursuance of the action of its Finance Committee, by the Treasury Trust Company, the owner of all the capital stock of the Traders and Mechanics Bank of Pittsburgh, the defendant above mentioned. Various renewals of this note were made and payments upon account of various sums at the time of these renewals reduced the indebtedness until on January 10th, 1908, it was \$4,000.00. Upon this last mentioned date Muehlbronner gave his renewal note for this sum at ninety days, payable to the order of the Traders and Mechanics Bank, defendant above stated. This is a collateral note, and states that the maker has "deposited herewith as collateral security for payment of this or any other liability or liabilities of mine to the holder hereof now due or to become due, or that may be hereafter contracted the following property, to wit:

112 shares Standard Ice Company.

112 shares Standard Ice Company preferred.

50 shares Watson Ordnance Company.

10 shares German Fire Insurance Company.

8 shares Fidelity Glass Company."

The collateral thus referred to is the same collateral which was deposited with the original note of May 21st, 1906.

The petitioner claims that while he is not a party to this note, he was and is the owner of one-third of the common and preferred stock of the Standard Ice Company, pledged therewith as security therefor, and that Charles A. Muehlbronner and Francis J. Torrance were the owners of the other two-thirds of said stock, each of the said parties having at the time of the deposit thereof as collateral on January 21st, 1906, separate certificates for their respective portions of the said stock. These separate certificates appear from the testimony to have been assigned at or before the giving of the original note above mentioned by a general assignment on the back of the certificates respectively, empowering the sale and transfer thereof without any limitation whatever. It appears that the purpose of making the loan evidenced by this original note was to enable the parties to take up their obligation given to the Provident Trust Company with this stock as collateral,

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and at the time the Traders and Mechanics Bank was applied to for the loan, Mr. Glass, the president of the bank, after being told of their desire, suggested that Mr. Muehlbronner give his own note for the amount of the loan, and that he pledge as security therefor the stock hereinbefore mentioned. This was accordingly done, and the original note of May 21st, 1906, was given.

It is alleged that as the original note and the several renewals thereof came due and payments were made on account of the indebtedness and interest, that Mr. Hagan, the petitioner, Mr. Torrance, and Mr. Muehlbronner each contributed one-third of the amount necessary to make the several payments.

There is no proof that the original note of May 21st, 1906, was not in exactly the same terms as the last renewal now held by the receiver, and the presumption is that all the renewals were made upon the form of note used by the bank at the various dates. If this be so, then the original note contained a pledge of all these stocks by Mr. Muehlbronner, the drawer, not only for the indebtedness created by the note but also for any other liability or liabilities of his to the bank then due or to become due, or that may be thereafter created. Even if the original note did not contain this general pledge of the stocks, the last renewal and some of its immediate predecessors did contain it, and the granting of time upon the note is sufficient consideration for the pledge.

At this date, May 21st, 1906, Mr. Muehlbronner was liable to the Traders and Mechanics Bank, as endorser, upon the note of the Monongahela Improvement Company, dated April 30th, 1906, at four months for the sum of \$2,750.00, and was also liable as endorser upon the note of the said Improvement Company, bearing the same date for the sum of \$3,850.00. Both of these notes, with interest from July 30th, 1907, are still due and owing to the Traders and Mechanics Bank, the defendant herein. On June 30th, 1907, Mr. Muehlbronner became endorser upon note of the Monongahela Improvement Company, bearing said date, for the sum of \$851.45, payable on demand to the Traders and Mechanics Bank of Pittsburgh. This note with its interest is still due and owing to the said bank and its receiver. On August 30th, 1907, Mr Muehlbronner, with others, became an endorser upon note of Monongahela Improvement Company, bearing said date, for the sum of \$2,850.00 at sixty days, payable to the Traders and Me-

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chanics Bank of Pittsburgh, which note with its interest is still due and unpaid to the said defendant or its receiver. On September 30th, 1907, Mr. Muehlbronner, with others, became the endorser of another note of the Monongahela Improvement Company, bearing the date last above mentioned, payable one month after date for \$5,038.16, payable to the Traders and Mechanics Bank of Pittsburgh, which note with its accrued interest is still due and unpaid. On May 1st, 1907, Mr. Muehlbronner, with others, became the endorser of the note of James E. Glass, bearing the last mentioned date, and payable four months thereafter for the sum of \$5,000.00, which note with its interest is still due and unpaid. Upon August 5th, 1907, Mr. Muehlbronner became the endorser, with others, upon the note of James E. Glass, bearing said last mentioned date, and payable four months thereafter for the sum of \$5,000.00 to the Treasury Trust Company of Pittsburgh, which company owned all the stock of the Traders and Mechanics Bank, and which note with its interest and securities therefor were duly transferred to the Traders and Mechanics Bank of Pittsburgh, to which the whole amount of said note and interest is still due and owing.

If the rights of the Traders and Mechanics Bank and its receiver are to be determined by the written contract and agreement under which it procured and holds the securities in question, the petitioner is not entitled to a return of any portion of the securities alleged to be owned by him until payment of all the indebtedness for which the securities were lawfully pledged has been made. While it is true at the time of the making of the original loan on May 21st, 1906, the president of the bank knew that the stock of Standard Ice Company offered to be pledged was apparently held and owned in equal proportions by the petitioner, Francis J. Torrance, and Charles A. Muehlbronner, he was given as security a general transfer of all the stock held by the owners respectively. It was agreed that Mr. Muehlbronner alone should sign the note and that the names of Hagan and Torrance need not appear thereon. The transfer upon the back of the certificates, as already stated, were in general terms without any limitation as to the use which was to be made of the stock by the transferee. There is no testimony in the case to show that at that time it was even suggested that this stock was not to be used by Mr. Muehlbronner, to whom the general assignments were

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given, for any other purpose than securing the loan evidenced by the note of May 21st, 1906. There is no suggestion that such was the understanding between the parties, and no intimation that anything was omitted from the assignments of this stock by fraud, accident, or mistake. The assignments, therefore, must be taken to mean just what the words employed therein clearly express, and these words make a transfer without any limitation as to the purpose for which the same are to be used by the transferee. The transferee did use this stock not only to secure the loan evidenced by the said last mentioned note but other loans then existing and made thereafter upon paper on which Mr. Muehlbronner was liable as endorser, and the assignments of the stock held by him gave him the right so to do. Under the written contract, as already suggested, the Traders and Mechanics Bank and its receiver has an undoubted right to hold the securities in question. The petitioner gave Muehlbronner a written transfer of the stock containing no limitation of his right to use or dispose thereof. No testimony appears which is sufficient to change the meaning of the written papers. There is no clear, precise, and indubitable proof that the papers mean anything else than that which is clearly expressed therein. The officers of the bank must be presumed to have acted upon that which was expressed by the papers taken by them at the time of the various loans. It may be that there are equities to be adjusted between Mr. Muehlbronner, Mr. Torrance, and the petitioner, Mr. Hagan, but we are unable to see any reason why the receiver of the defendant company should be called upon in any way to aid in adjusting these equities. The receiver has no claim to enforce against Mr. Hagan. The bank which he represents apparently has a clear legal right to the securities pledged until the indebtedness for which the pledge was made is fully paid. It is the duty of the receiver to collect this indebtedness without unnecessary delay, and we therefore discharge the pending rule at the cost of the petitioner, William C. Hagan.

CRUCIBLE STEEL COMPANY *vs.* PENNSYLVANIA RAILROAD
COMPANY.

*Railroads—Inter-plant and intra-plant movements—Demur-
rage.*

Certain free time for loading and unloading is a necessary incident to all demurrage rules, and whenever such rules apply to any movement the prescribed free time must also apply.

When demurrage accrues on any movement it must be assessed under the rules applicable to the facts of that particular movement.

Under the rate orders of the Pennsylvania Railroad now effective, when a car is delivered upon the tracks of an industrial plant and unloaded, and is then used in intra plant movements, the usual free time for loading and unloading must be allowed, as specified in said orders.

Before the Public Service Commission of Pennsylvania.
File No. 1095.

BY THE COMMISSION.

On July 8th, 1911, the respondent company issued a rate order (R. No. 977, yet effective) of \$2.50 per car upon iron and steel articles and ore "when arrangement for use of tracks has been granted by the Operating Department between two plants of the same interest for local movement by individual power, distance not to exceed ten blocks."

On October 9th, 1911, the same company issued another rate order (R. No. 982, also yet effective) of \$.50 per car upon six specified commodities, one of which was dirt, "between two mills of the same plant (intra-plant movement) when movement is by individual power over carrier's tracks and when arrangement for use of tracks has been granted by the Operating Department."

Both of these rate orders related to movements at Pittsburgh, Pa.

The complainant company has two steel mills in the city of Pittsburgh, located along the branch of the railroad of the respondent, one of them at Thirtieth Street, and the other 2,800 feet distant, within ten blocks, near Thirty-sixth Street. A part of the plant at Thirtieth Street is on one side of the railroad, and the other part of the plant is on the other side of the railroad. Each plant and each of these two parts is connected by sidings and switches with tracks of the respondent's rail-

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road. Cars consigned to the complainant are delivered upon interchange tracks in the yard of the respondent at Thirty-sixth Street, and from there the complainant with its own locomotive and its own crew takes the cars over its sidings and the tracks of the respondent to its plant at Thirty-sixth Street, or to whichever part of its plant at Thirtieth Street it may desire. With the car or train of the complainant is a conductor selected by the respondent but paid by the complainant. This method of delivery appears to have been of advantage to the complainant and at least was accepted by it. Testimony was given in its behalf that the space at its disposal is very limited and that it could not operate its plant if the respondent should shift the cars into its yard once or twice a day. It frequently happens that after a car is unloaded by the complainant it is then again loaded, taken over the tracks of the respondent to the other plant, or to the other part of the same plant, and again unloaded. It sometimes happens that after the second unloading the car is reloaded and returned to the respondent for transportation elsewhere. In those instances in which commodities are transported from one plant or one part of the plant to another, a shipping order is required by the respondent. The empty cars and the cars reloaded for shipment outside of the city are returned to the respondent at Thirty-eighth or Thirty-ninth Streets.

The respondent has imposed demurrage at the rate of a dollar per day for the detention of each car beyond the usual free time of 48 hours after delivery of the car upon the interchange tracks. The complainant claims that this is an improper charge when the inter-plant or intra-plant movements covered by the orders aforesaid are made.

The difficulty in this case has arisen because of the fact that the transactions between the complainant and respondent include two kinds of movements, and that the effort has been made to blend them together and regard them as but one.

The first of these transactions relates to the delivery of the inbound freight. The delivery of this freight would appear to be complete when the cars, placed upon the interchange tracks at Thirty-sixth Street are there accepted by the complainant. It is such delivery as has been acceptable to both parties. The subsequent shifting is due to the fact that the different parts of the complainant's plant are separated and such shifting is done by the complainants for their own con-

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venience. The fact that the conductor is selected by the respondent does not change the situation for the reason that it is necessary that he should understand the method of conducting business and the rules governing the railroad of the respondent in order to avoid accidents and to have this transportation accord with the other transportation over the same tracks, and this explains his selection.

There is nothing in the evidence to show that it was not in the contemplation of the parties that this shifting for the purpose of completing the unloading of the inbound freight would be done within the usual free time allowed, and we do not understand either that such free time is not allowed or that any exception is taken to demurrage charged on these cars for detention beyond the usual 48 hours when they are not engaged in the inter-plant movements we will now consider.

The second series of transactions are of a different character; and just here is where the real contention of the parties rests. In ordinary cases when a car is unloaded it is returned empty to the carrier. In this instance, owing again to the separation of the plants of the complainant and proximity of the respondent's tracks, it becomes a matter of convenience to the complainant to use the cars after they are emptied for the transportation of materials from one part of the plant to the other. The rate orders referred to provide for such transportation. They make a rate applicable to it. They describe the commodities which may be so transported, including dirt, which is not at all likely to be transported otherwise than between these parts of a plant. Each time that the cars of the respondent are so used for this new transportation it is informed, because it requires a shipping order to be issued by the complainant for the purpose of authorizing the movement and as a basis for the assessment of the proper charge therefor.

Certain free time for loading and unloading is a necessary incident of all demurrage rules, and wherever such rules apply to any movement the prescribed free time must also apply. Moreover, when any demurrage accrues on any movement it must be assessed under the rules applicable to the facts of that particular movement.

Now these intra-plant shipments are made under and by virtue of the rate orders above mentioned, and it is to be noted that each of said orders contains the following:

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DEMURRAGE AND CAR SERVICE REGULATIONS.

"Under the tariff, when the freight is to be loaded by consignor or unloaded by consignee, \$1.00 per car per day or fraction thereof, for delay beyond forty-eight hours in loading or unloading, will be added to the rates names herein and constitute a part of the total charges to be collected by the carrier on the property; except that Car Demurrage Bureau or local regulations at shipping point or destination lawfully on file with the Interstate Commerce Commission shall prevail and govern at said points."

Here, then, we have a definite and specific demurrage regulations for these very shipments, prescribed by this respondent, which states only that demurrage will be assessed "for delay beyond forty-eight hours in loading or unloading," unless, indeed, there be some local regulation * * * to "govern at said points."

For such "local regulations" the respondent refers us to Section E of Rule 3 of the Uniform Demurrage Rules (Tariff P. R. R., T. D-I. C. C. No. 50) which reads as follows:

"On cars to be delivered on interchange tracks of industrial plants performing their own switching service, time will be computed from the first seven A. M. following actual or constructive placement on such interchange tracks until returned thereto."

On this clause of said demurrage rules the respondent makes its stand.

But this is a general rather than a local regulation, which applies only to those movements in and for which cars are placed on interchange tracks, and evidently does not apply where a distinctively new and different shipment of the car intervenes between its receipt and its return to said tracks. When the inbound freight is unloaded and a new and different movement is inaugurated that original movement is terminated, and the application of said local regulation then ends. After such unloading the car is again loaded and shipped over the respondent's rails, in charge of its employees and under its tariffs, in which demurrage regulations for that movement are embodied, to another part of the plant for unloading, thus constituting an entirely new shipment. For this purpose the car does not have "to be delivered on interchange tracks," it being already within the plant of the industry, and it would be perfectly useless and wholly unnecessary to order in a new

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car or to return this car to said tracks and immediately take it back for the intra-plant movement; and this was certainly never in the contemplation of the parties. That individual power is used for the movement may affect the rate, but it does not change the movement. Indeed in other rate orders of the respondent (R-908 & J-1983) the rate prescribed is the same whether the movement be made by individual or by carrier's power.

It is only by completely ignoring this intervening intra-plant movement that the so-called "local regulations" can possibly be made to apply here; and this is just the position taken by the respondent as stated by its counsel at the hearing (P. 5) when he says: "Our theory is that we know nothing of that movement." This is practically an admission that said regulation does not apply to the movements in question here, and since the rate orders providing for said movements contain demurrage regulations applicable thereto they must be so applied. So, it is evident that the respondent regards this question as if, after the inbound freight is placed on the interchange tracks, nothing except the unloading of that car occurs until its return to said tracks; and this, notwithstanding it has in the meantime conducted another movement of the same car over its tracks and made its proper charge for that service. This is a total ignorance of the essential facts of the case and a direct violation of the demurrage rules prescribed for these intra-plant movements, and cannot be allowed.

The fact is that these parties conferred about the situation at complainant's plant, both being familiar with conditions there, and as a result of that conference said rate orders were promulgated, with a full understanding of just how the movements therein provided for would be conducted; and for the greater part of the time since those orders were made effective the construction given them by the respondent accorded entirely with that herein expressed, and the usual free time was allowed.

We conclude, therefore, that the general demurrage regulations contained in said rate orders—and in any similar ones for these intra-plant movements, if such there be—control.

In this view of the case it is unnecessary to study and analyze the movements in question and determine their exact character and the precise relation of the respondent to them. But there seems to be no reason why, upon this new and ad-

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ditional contract for such movements, the usual free time for loading and unloading should not be allowed. Such free time has no relation to the distance the commodities have to be transported, whether 2,800 feet or one hundred miles. It is allowed for the purpose of loading and unloading, and these designated commodities, ore, iron, steel and dirt, all have to be handled.

We do not regard the question of jurisdiction as serious, for we assume no authority over demurrage accruing in interstate transportation. As we view the matter, the cars delivered to the complainant in interstate transportation cease to be further connected therewith as soon as they are unloaded and engaged in intra-plant movements, the same as if they were then loaded for out-bound intra-state transportation.

Nor do we discover any difficulty because of the average demurrage agreement, which is affected not at all by the character of the shipments or transportation in which the cars may be engaged.

ORDER.

In accordance with the views expressed in the opinion filed herewith, this Commission hereby determines that the complainant, Crucible Steel Company of America, since Rate Orders R. No. 977, and R. No. 982 of the respondent The Pennsylvania Railroad Company, became effective respectively, *has been*, and so long as said Rate Orders remain effective is, *entitled* to allowance of the free time for loading and unloading specified in said orders, and directs said respondent to grant the same.

IN THE MATTER OF THE DISCONTINUANCE OF REPORTING INSPECTIONS OF LOCOMOTIVE BOILERS.

Public Service Commission. General Order No. 3.

BY THE COMMISSION:

And now, January 8, 1914, it is ordered that after January 31, 1914, railroad companies will not be required to send to this office reports of inspections of locomotives' boilers inspected by the Interstate Commerce Commission, report of which inspections are made to the Interstate Commerce Commission.

REGULATING NOTICE OF CHANGE IN TARIFFS OR SCHEDULES IN THE MATTER OF FARES FOR EXCURSIONS LIMITED TO CERTAIN DESIGNATED PERIODS.

Public Service Commission. General Order No. 4.

BY THE COMMISSION:

And now, January 21, 1914, it is determined and ordered that fares for an excursion limited to a designated period of not more than three days may be established, without further notice, upon posting a tariff one day in advance in two public and conspicuous places in waiting room of each station where tickets for such excursion are sold and mailing a copy thereof to the Commission.

Fares for an excursion limited to a designated period of more than three days and not more than thirty days may be established upon a like notice of three days.

Fares for a series of daily excursions, such series covering a period not exceeding thirty days, may be established upon like notice of three days as to the entire series, and separate notice of the excursion on each day covered by the series need not be given.

Fares for an excursion limited to a designated period exceeding thirty days will require the statutory notice unless shorter time is allowed in special cases by the Commission.

IN THE MATTER OF REGULATIONS GOVERNING THE PROTECTION
OF GRADE CROSSINGS.

Public Service Commission. General Order No. 5.

By THE COMMISSION :

First: Before crossing any steam railroad track at grade all electric railway cars shall be brought to a full stop by the motorman thereof, who shall not operate his car over said crossing until signalled so to do either by a watchman, stationed and maintained at the crossing for that purpose, or by the conductor of his car, who shall proceed to and over the crossing, and who shall not signal to the motorman to cross the tracks without first ascertaining that there are no engines, cars or trains within his view, or, to his knowledge, approaching the crossing, and that it is safe for the motorman to proceed with his car over said crossing; except that at crossings of electric railway tracks by railroad sidings leading to railroad yards, or to industrial plants, whereby agreement between the companies operating their cars, trains, and engines over the same, it is provided specifically that a brakeman, flagman, or employee of the railroad company shall proceed to said crossing ahead of the passage of any car, train, or engine of the railroad company over said crossing and flag the crossing and warn the public of the approach and passage of such railroad car, train, or engine.

The Investigator of Accidents of The Public Service Commission shall be notified of such arrangement, and thereafter the cars, trains, or engines shall be operated in accordance therewith.

At crossings where conditions are specially dangerous, safety devices shall be provided, which shall be submitted to, and approved by, the Investigator of Accidents of The Public Service Commission.

Second: A light shall be displayed on the dead end of railroad trains when it is necessary to shift cars by night over a public crossing, notwithstanding the fact that the crossing constitutes a part of the yards.

IN THE MATTER OF THE REGULATION OF THE OCCUPANCY OF
FRONT PLATFORMS OF CARS OF STREET RAILWAY COM-
PANIES.

Public Service Commission. General Order No. 6.

BY THE COMMISSION:

And now, February 20th, 1914, it is ordered that no passengers shall be permitted to ride on the front platforms of closed cars, and that on open cars the carriage of passengers on the front platforms shall be strictly limited to the number that can be conveniently accommodated upon and do occupy the seat provided on said platforms; and that those occupying said seat shall be prohibited from engaging the attention of the motorman, by conversation or otherwise.

FREE PASSES BY RAILROADS AND STREET RAILWAY COMPANIES.

Public Service Commission. Administrative Ruling No. 1.

BY THE COMMISSION, February 5, 1914.

Numerous requests have been presented to the Commission by railroad and street railway companies and other persons interested, for an administrative ruling upon the questions—

1st—Whether or not the issuance of free passes to officers and employees of railroad companies to be used for the transportation of dependent members of the families of such officers and employees; and

2nd—Whether or not the according of free transportation by common carriers to policemen and firemen in the discharge of their public duties.

are violations of the Act of July 26th, 1913, known as
"The Public Service Company Law."

A public hearing in this matter was held by the Commission at Harrisburg, on the 20th day of January, 1914, at which railroad and railway companies and others appeared and were heard, and all persons interested were given an opportunity to be heard. In this case the Commission has concluded to rule administratively upon the questions presented.

I. After careful consideration the Commission is of the opinion that the spirit and true intent and meaning of the provisions of The Public Service Company Law of July 26th, 1913,

Free Passes by Railroads and Street Railway Companies.

are not such as to require the Commission to regard as a violation of the law the practice of railroad companies of issuing free passes to their officers and employees to be used for the transportation of dependent members of the families of such officers and employees, which practice has had the sanction of custom since the adoption of the Pass Provision of the Constitution of 1874, and the Act of June 15th, 1874, passed to carry that provision of the Constitution into effect.

It is therefore ruled that the granting without unfair discrimination by railroad companies of free passes to their officers and employees, to be used for the transportation of dependent members of the families of such officers and employees, will not be regarded by the Commission as a violation of the provisions of the law.

2. The Commission is further of the opinion that free transportation, without unfair discrimination, by common carriers, on behalf of the commonwealth, or on behalf of any municipality thereof, of policemen in the performance of their public duties, and similarly, that free transportation, without unfair discrimination, by common carriers, on behalf of any such municipality, of firemen in the performance of their public duties, is not such free transportation as is prohibited by the provisions of The Public Service Company Law, and will not be regarded by the Commission as a violation thereof.

IN THE MATTER OF THE PROPOSED CROSSING OF THE STRUCTURES AND FACILITIES OF THE PENN CENTRAL LIGHT AND POWER COMPANY BY THE STRUCTURES AND FACILITIES OF THE RAYSTOWN WATER POWER COMPANY IN THE BOROUGH OF MT. UNION, HUNTINGDON COUNTY.

Public Service Commission. Certificate of Public Convenience.

BY THE COMMISSION:

And now, to wit, March 5th, 1914, after hearing and consideration by the Commission, it is determined and ordered that a Certificate of Public Convenience be issued approving the proposed construction of a crossing as set forth in the notice and accompanying plans and specifications filed by the Raystown Water Power Company with the Commission, provided, however, that said crossing shall be used for the purpose of transmitting electric current for the furnishing of power only and not for the furnishing of light, for the reason that the Commission's approval of the ordinance of said Borough of Mt. Union of December 13th, 1913, amending the ordinance of said borough of July 16th, 1913, granting said Raystown Water Power Company certain rights, powers, franchises, and privileges for the purpose of furnishing light in said borough, has not been applied for and obtained, as required by The Public Service Company Law.

MINERS ALONG THE SCHUYLKILL & SUSQUEHANNA BRANCH,
vs. PHILADELPHIA & READING RAILWAY COMPANY.

Railroads—Passenger service—Installation of additional trains.

Public Service Commission. No. 50.

BRECHT, Commissioner, March 5, 1914.

In the complaint of the miners living along the Schuylkill and Susquehanna Branch of the Philadelphia and Reading Railway Company vs. the Philadelphia and Reading Railway Company, the Commission finds, after looking carefully into the situation, that conditions at Pine Grove in the morning and the time when the morning trains must arrive at the mines will not enable the Railway Company to furnish a service to Outwood and vicinity at that hour without the installation of

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an additional train. In the evening, however, respondent avers that it is in a position to take the miners home to Outwood and vicinity on the Schuylkill and Susquehanna Branch as soon as they reach Pine Grove from the mines without incurring the expense of furnishing an extra crew and train for that service.

As the operation of an additional train for the miners from Outwood and vicinity in the morning would involve a net loss of practically twenty-five dollars (\$25.00) a day to the railway company, the Commission is not warranted, under the circumstances, in issuing an order upon the railway company to install such service for the accommodations of complainants; but the Commission recommends that an evening service between Pine Grove and Outwood be at once installed for the accommodation of the complainants and operated on a schedule by which the train will reach Outwood not later than six o'clock p. m.

The installation of an evening train at that hour will bring the miners home directly from the mines, and furthermore will no longer compel them to walk several miles in wet or damp clothes after leaving the mines which seemed to be the most serious objection complainants offered against their present way of getting to and from the mines.

The Commission further recommends that respondent keep an accurate record of the number of passengers carried daily on this train for the next six months and at the expiration of that period to submit a copy of the records so kept to the Commission for its information, and for such further action, if any, that it may then deem proper to take in the matter.

An order will be entered in accordance with the above recommendations.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, a full investigation of the matters and things involved having been had, and the Commission having on the date hereof filed an opinion containing its findings of facts and conclusions thereon, which said opinion is hereby referred to and made a part hereof:

It is ordered that the Philadelphia and Reading Railway Company install, at once, an evening service between Pine

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Grove and Outwood for the accommodation of the complainants and operated on a schedule by which the train will reach Outwood not later than six o'clock in the afternoon.

It is further ordered that the said railway company keep an accurate record of the number of passengers carried daily on this train for the next six months and, at the expiration of that period, submit a copy of the record kept to the Commission for its information and for such further action, if any, it may deem proper to take in the matter.

COMMONWEALTH OF PENNSYLVANIA, EX REL. JOHN C. BELL, ATTORNEY GENERAL, *vs.* THE CITY OF POTTSVILLE, A MUNICIPAL CORPORATION, AND F. PIERCE MORTIMER, MAYOR, HARRY K. PORTZ, CONTROLLER, HUGH DOLAN, A. L. ECKERT, JAMES N. SHELLHAMMER AND JOSEPH N. NICTER, COUNCILMEN, AND F. S. FREILER, P. J. MARTIN, FRANK LITTLE, HORACE MCCOOL, JOSEPH JOHNSON, T. E. HUMMEL AND C. ACKERMAN, ALDERMAN, OFFICERS OF SAID CITY OF POTTSVILLE.

Boroughs—Election to determine whether a borough shall become a city of the third class—Order—Statutes—Construction—Acts passed at some session—Repeal—Acts of April 15, 1907 and May 28, 1907.

The meaning of the title of an Act of Assembly is not to be sought in the body of the Act. The title of the Act must clearly express the purpose of the Act, in accordance with Article III, Section 3, of the Constitution that no bill shall be passed containing more than one subject which shall be clearly expressed in its title.

Repeal is purely a matter of intention; and as to two statutes relating to the same subject matter, passed at the same session of the Legislature, the presumption is against the repeal of the one by the other.

The Act of May 28, 1907, P. L. 268, did not repeal the Act of April 15, 1907, P. L. 66. The order submitting to the voters of the borough of Pottsville the question whether the borough should become a city of the third class was therefore properly issued by the Court of Quarter Sessions of Schuylkill County.

Where it is contended that an order for an election to determine whether a borough shall become a city of the third class must issue from the Council of the borough, and, after an election held upon an order issued by the Court of Quarter Sessions, the borough

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Council joins in a petition for letters patent, this action on the part of the Council is a ratification of the election; and if, as contended, the Council had the sole power to originate the proceeding, this power included the power to ratify.

Quo Warranto. C. P. Dauphin County, No. 2, Commonwealth Docket, 1914.

John C. Bell, Attorney General, and *J. E. B. Cunningham*, Deputy Attorney General, for plaintiff.

Arthur L. Shay and *E. P. Leuschner*, for defendants.

KUNKEL, P. J., April 11, 1914.

This is a proceeding by quo warranto, in which the Commonwealth calls upon the defendant, the city of Pottsville, to show by what authority it exercises the rights, powers and privileges of a city of the third class, and upon the other defendants to show by what authority they occupy and exercise their respective offices as mayor, controller, councilmen and aldermen in that city. The case comes before us on the demurrer to the answer which has been filed to the suggestion for the writ.

At the general election held November 8, 1910, a majority of the qualified electors of the borough of Pottsville voted in the affirmative on the question of whether the borough should become a city of the third class. On November 12, 1910, the return of the vote cast at the election was made to the Secretary of the Commonwealth, and pursuant thereto, on March 22, 1911, letters patent were duly issued by the Governor, incorporating the borough of Pottsville into a city of the third class under the name and style of the city of Pottsville. The letters patent were issued on the application of the officers of the borough by the direction of the borough council. In the application were set forth the population of the borough, the fact that one hundred qualified electors thereof had petitioned the Court of Quarter Sessions, praying that the question whether the borough should become a city of the third class be submitted to the qualified electors, that the order submitting the question was made by the court, the result of the election which was held and a description of the boundaries of the borough and of the proposed city. On November 4, 1913, an election for city officers for the city of Pottsville was duly held and the defendants above named were elected to their

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respective offices. The order submitting the question of whether the borough should become a city was issued on the petition of one hundred qualified electors of the borough out of the Court of Quarter Sessions of the county. It is contended by the commonwealth that the election was illegal and void because the order was issued out of the Court of Quarter Sessions and not out of the borough council, that the authority to issue the order is found, not in the Act of April 15, 1907, P. L. 66, but in the Act of May 28, 1907, P. L. 268, and that the latter Act repealed the former and was the last legislative utterance on the subject. The question presented, therefore, is whether the Act of May 28, 1907, repealed the Act of April 15, 1907. By the Act of April 15, 1907, the order submitting the question of the election is required to be issued by the Court of Quarter Sessions. This Act purports to be and is an amendment of the Act of April 10, 1905, P. L. 127, which is an amendment of Section 1 of Article 1 of the Act of May 23, 1889, P. L. 277, which provides a method for carrying into effect Article XV, Section 1, of the Constitution, relating to the chartering of cities. The Act of April 15, 1907, amends the Act of 1905, under which the order for the election was directed to be issued by the borough council, by requiring the order to be issued by the Court of Quarter Sessions. The Act of May 28, 1907, is also an amendment in effect of the Act of April 10, 1905, and purports to amend that Act by "prescribing the manner, and computing and making return of same." It recites the Act of April 10, 1905, declares it shall read as follows, and then re-enacts it with the amendment.

It will be observed that the title to the Act of May 28, 1907, is indefinite and obscure. There is an omission which leaves meaningless and ineffective the notice of the amendment which is contemplated. Upon reading that part of the title which sets forth the proposed amendment, one would not be able to determine what the amendment was intended to be. Of course it is quite apparent by looking at the body of the Act what is intended, but to do so would be a reversal of the method which the Constitution requires. We are not to ascertain what the title means by looking into the body of the Act, but we are to ascertain what the amendment in the Act is to be from the title, and if there is an attempt to set forth the amendment in the title the purpose of the amendment must be clearly set forth, otherwise there is a failure to comply with the con-

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stitutional requirement "That no bill * * * * shall be passed containing more than one subject, which shall be clearly expressed in its title." Article III, Section 3, Constitution. However, without deciding that the Act of May 28, 1907, is unconstitutional and void because its title is defective or for the other reasons which have been suggested, it is not apparent that the legislature intended by its passage to repeal the Act of April 15, 1907, which was passed at the same session. Repeal is purely a matter of intention; and the presumption is against the repeal of the one by the other in the case of two statutes relating to the same subject matter, passed at the same session. The purpose of the Act of May 28 is set forth in its title. The Act purports to amend the Act of April 10, 1905, and turning to the body of the Act we find the amendment pertains to the manner of the voting, the form of the ballot to be used and the return of the votes cast. The re-enactment of the Act of April 10, 1905, it is manifest, was solely in compliance with the constitutional requirement, that so much of an Act as is revived, amended, extended, or conferred shall be re-enacted and published at length. Article III, Section 6, Constitution. It does not appear that by the re-enactment it was intended to revive the Act, for the title purports to amend, not to revive. If it was the intention to revive and the re-enactment was intended to be the last and only declaration of the legislature on the whole subject, such intention could not be effectuated by a title giving notice of another and limited purpose. Because of the specific character of the notice, we fail to see how the re-enactment can be treated and construed to be a revival of the Act of 1905, and thus to be a repeal of, or a substitute for, the Act of April 15, 1907. We can find nothing in the Act to warrant such a conclusion. Indeed its sole purpose, so far as it can be gathered from the title and body of the Act, was to amend by prescribing the manner of voting, and the form of the ballots. When that purpose was accomplished all that the Act proposed to do was done, and if the title is to be held sufficient to embrace a change as to the source from which the order submitting the election to the electors is to come, as was said in *Brown's Estate*, 152 Pa. 401, it "would be misleading and obnoxious to several of our decisions. *Dorsey's Appeal*, 72 Pa. 192; *Mauch Chunk vs. McGee*, 81 Pa. 433; *Beckert vs. Allegheny*, 85 Pa. 191." In the case referred to the old statute was re-enacted and amended, and it was held, that it was not revived so as to

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restore to it a proviso which theretofore had been repealed. See also *Rogers vs. Glendower Iron Works*, 17 W. N. C. 444. Nor can the general repealing clause in the second section of the Act be construed to repeal the Act of April 15, 1907. That section must be limited in view of the manifest intention of the legislature to the repeal of any acts or parts of acts or legislation inconsistent with the amendment. Am. and Eng. Ency. of Law, Vol. 26, p. 720; Cyc. Vol. 36, p. 1069.

The sum of the whole matter seems to us to be this: The legislature of 1907 intended to amend the Act of April 10, 1905, in two particulars, (1) in respect to the origin of the order for the election, and (2) in respect to the manner of voting and the form of the ballots; and it accomplished this object, not by one enactment embracing both amendments, but by the two independent statutes of April 15 and May 28, 1907. It is true that this object was at first accomplished by the former statute, for it contained both amendments, but afterwards the amendment relating to the manner of voting was enacted by means of the latter statute in somewhat different form. By the construction we have adopted effect is given to both acts in conformity to the rule, that where two acts relating to the same subject matter are passed at the same legislative session they are to be construed together, if possible, so as to give effect to each. Cyc. Vol. 36, p. 1086; End. Interpr. of Statutes, Section 188; *White et. al. vs. City of Meadville*, 177 Pa. 651.

Besides what we have said, it appears by the answer to the suggestion for the writ, that the borough council joined in the application to the Governor for the letters patent which were issued incorporating the borough into a city of the third class, with knowledge that the order submitting the question to the people had been issued on the petition of one hundred qualified electors by the Court of Quarter Sessions, and that the election had been held in pursuance thereto. Thus the borough council recognized the election and acquiesced in all that had been done subsequently to and in pursuance of the order of the court. This would seem to be a ratification of the whole proceeding. If, as contended by the commonwealth, the borough council alone had authority to make the order and thus to commence the proceedings which gave the electors an opportunity to act upon the question, it follows it had the power to ratify that which was done, for the power to ratify is involved in the power to authorize. Whether it originally

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authorized the election or not, if it afterwards ratified it, that, it seems to us, ought to have closed the door against all controversy, especially as it is not suggested that any of the requirements of the statute which provide for the submission of the question to the people was not complied with, excepting that relating to the initiative order.

In view of the foregoing considerations, we are of the opinion that the defendant, the city of Pottsville, is lawfully entitled to be a city of the third class, and that the other defendants are entitled to hold and enjoy their respective offices.

Accordingly judgment is directed to be entered on the demurrer against the commonwealth and in favor of the defendants.

IN THE MATTER OF THE GRANTING OF FREE TRANSPORTATION,
OR TRANSPORTATION AT REDUCED RATES TO MINISTERS OF
RELIGION.

Common carriers—Reduced rates to ministers of the gospel.

Common carriers may transport ministers of religion, between the states, free or at reduced rates.

Intra state transportation of ministers of religion, free or at reduced rates, is illegal.

Public Service Commission. Administrative Ruling No. 2.
By THE COMMISSION, March 18, 1914.

At the public hearing held by the Commission on January 20, 1914, at Harrisburg, reasons were presented by ministers of religion for an administrative ruling by the Commission, that common carriers might accord such ministers the privilege of free transportation or reduced rate transportation, between points within the boundaries of the State of Pennsylvania.

Common carriers may lawfully transport ministers of religion between the states, free or at reduced rates, but this is expressly warranted by the provision of the Federal Interstate Commerce Act, as amended, by way of express exception to the anti-discrimination clause of that act of congress.

Transportation of passengers wholly between points in

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Pennsylvania is governed by the provisions of the law of this state.

The Constitution of Pennsylvania contains an explicit provision prohibiting the common carriers from granting free passes or passes at a discount to any person other than those within the meaning of the exception therein expressed, and the constitution further enjoins upon the legislature the duty to carry such prohibition into effect by means of appropriate legislation.

In the Act of July 26th, 1913, known as The Public Service Company Law, and defining the powers and duties of public service companies of various kinds, including common carriers, and providing for the regulation of such public service companies, it is by Section 8 of Article III, made unlawful for any common carrier inter alia "to charge, demand, collect, or receive, directly or indirectly, by any special rate, rebate, drawback, abatement, or other device whatever, from any person or corporation, for any service rendered or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect, or receive from any other person or corporation for a like and contemporaneous service under substantially similar circumstances and conditions." Carriers are likewise prohibited from making or giving "any undue or unreasonable preference or advantage in favor of or to any person or corporation or any locality, or any particular kind or description of traffic or service in any respect whatsoever, etc."

It may be and probably is true in many instances, more especially in the country districts of the states, that the monetary reward received by clergymen for their services is inadequate to enable them to meet their necessary expenses and transportation fare. The Commission has also given due consideration to the force of the argument that ministers of religion are carrying on work of great public benefit, but we are unable to differentiate between ministers and other classes of the community to such an extent as would justify a discrimination in rates upon that ground. It is not improbable that under the requirement that ministers pay the same fare as other passengers for a like service, their pecuniary compensation will in the long run rise to a proper level of adjustment.

It is therefore the opinion of the Commission, after careful consideration, that the according to ministers of religion of free intra-state transportation, or such transportation at re-

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duced rates is discriminatory and illegal under Sections 8 and 9 of Article III of The Public Service Company Law, and that the Commission is without warrant to otherwise regard it, under the present public policy of this state as fixed by law, and the Commission has concluded so to rule administratively in this case.

It may be that should application be made to the legislature at the next or some subsequent session, means may be found by that body to afford the relief desired by the applicants.

DEPARTMENT OF HEALTH.*Diphtheria antitoxin—Distribution in case of emergency—Cost.*

A state hospital, receiving an appropriation from this state, should pay for diphtheria antitoxin secured from a state distributor in cases of emergency.

Attorney General's Department. Opinion to E. M. Young, secretary and treasurer Homeopathic State Hospital, Allentown, Pa.

BELL, Attorney General, April 15, 1914.

This department is in receipt of your letter of April 4, 1914, inquiring whether the Department of Health of the State of Pennsylvania is within its rights in requiring you to pay for state diphtheria antitoxin which you obtained from one of the state distributors, for use in an emergency.

We understand there was danger of the spread of diphtheria in your institution, and that thereupon the physician in charge applied to the distributor of the state at Allentown, who furnished the physician with the required antitoxin.

The appropriation to the Department of Health for the purchase of antitoxin (Act of July 16, 1913, P. L. 755, at page 795) provides a fund "for the payment of the cost of diphtheria antitoxin and other products for free distribution for the poor," etc. Following the manifest intention of this appropriation the Department of Health held uniformly that while it is its duty to furnish diphtheria antitoxin to all persons who need it, the antitoxin should be paid for by persons who can afford to do so.

The application and receipt which must be presented to the

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distributor in order to obtain the antitoxin contains a certificate "that the persons mentioned for whom this antitoxin is furnished, for the treatment of diphtheria, are indigent in the sense that they cannot procure the necessities of life and at the same time purchase antitoxin."

The physician from your hospital applied for the antitoxin in question for the hospital, and signed such a certificate.

In view of the fact that the Homeopathic State Hospital receives an appropriation from the state which presumably is sufficient to enable it to procure such medical supplies as are needed for the conduct of the institution, it cannot be said to be financially unable to pay for the antitoxin, and it would seem to be contrary to public policy to put the entire burden of supplying antitoxin upon the Department of Health.

You are, therefore, advised that it is proper that your institution should pay the distributor for the antitoxin which was used, in order that the distributor may procure other antitoxin to replace it, and thereby be in a position to afford relief in case of another emergency.

SPECIAL FISH WARDENS.

Special fish wardens—State police—Compensation.

The superintendent of state police may detail members of the state police force to act as special fish wardens. When on such duty, their expenses may be paid to the respective troop commanders, out of the appropriation for the payment of salaries and expenses of fish wardens, but no other compensation.

Attorney General's Department. Opinion to N. R. Buller, Commissioner of Fisheries.

BELL, Attorney General, April 14, 1914.

This department is in receipt of your letter of April 6th, inquiring whether it would be legal, if the superintendent of state police details men from his force to assist your department, for your department to pay the expenses of such men from its appropriation.

You are advised that this would be legal.

The Act of 1 May, 1909, P. L. 353, for the protection of fish, provides in Section 30 that the Commissioner of Fisheries

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may appoint special wardens who shall not be entitled to any salary nor to reimbursement for expenses "unless such special fish wardens should be detailed for duty by the Commissioner of Fisheries, in which case the Commissioner of Fisheries is authorized to make a per diem allowance for compensation and reasonable expenses out of any appropriation which may be made for the payment of wardens." Your authority, therefore, to appoint special fish wardens and pay them a salary and expenses is expressly conferred.

The Act of 2 May, 1905, P. L. 361, creating the Department of State Police, provides in Section 5:

"They are also authorized and empowered to act as forest, fire, game. and fish wardens."

The members of the state police receive a regular salary and it, therefore, would not be legal for your department to pay them any additional compensation (*Walsh vs. Luzerne County*, 36 Super. Ct. 425, 1908), but as they would be entitled to their reasonable expenses from the Department of State Police if the expenses were incurred in the course of their work for that department, we can see no reason of public policy why their expenses incurred in the course of their work for the Department of Fisheries may not be paid by that department as the expenses of other special fish wardens may be.

You are, therefore, advised that if the superintendent of state police deems it advisable to detail members of the state police force as special fish wardens, their expenses may be paid by you to the respective troop commanders from the appropriation of forty thousand dollars (\$40,000.00) made by the Act of 16 July, 1913, P. L. 755, at page 782: "For the payment of salaries and reasonable expenses of fish wardens."

STATE-AID HIGHWAYS.

State-aid highways—Change of plans and specifications.

The plans and specifications for a state-aid highway cannot be changed after the contract has been let, without re-advertisement.

Attorney General's Department. Opinion to S. D. Foster, Chief Engineer, State Highway Department.

BELL, Attorney General, April 13, 1914.

This department is in receipt of your letter of April 1st, inquiring whether your department has a right to agree to a change in the specifications for the improvement of a state-aid road in Scalp Level Borough, upon the application of the borough. The change desired is that the surfacing be brick paving instead of water-bound macadam.

However desirable it might be, in this particular case, that your department should have the right, at the request of the local authorities most closely affected, to make changes in the specifications for the improvement of roads, you are advised that under the existing legislation there is no such right.

Section 18 of the Highway Act of May 31, 1911 (P. L. 468), provides:

"The kind of materials to be used on any particular highway, or part thereof, to be built, shall be decided or selected by the State Highway Commissioner before the contract is let."

This would be necessarily implied from the provisions of sections 13 and 14 concerning the letting of contracts for highway work.

Section 13 begins:

"All work of construction, building, or re-building of highways, excepting that of repairing and maintenance done under the provisions of this act, shall be by contract, and shall be according to plans and specifications to be prepared in every case by the State Highway Department; and in awarding any contract the work shall be given to the lowest responsible bidder."

Section 14 provides that the advertisements for proposals for work must designate where the plans and specifications may be had.

If, after the contract were advertised and let to the lowest

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responsible bidder, alterations should be made in the plans and specifications, there would be no certainty that the actual work done would correspond with the work advertised and bid for.

You are therefore advised that if the borough desires your department, and your department is willing, to change the plans and specifications, the contract should be re-advertised.

INDIGENT INSANE.

Indigent insane—Maintenance in county institutions.

Counties are entitled to receive from the state treasury the sum of two dollars for each indigent insane person, whether criminal or not, maintained in county institutions.

Attorney General's Department. Opinion to Dr. Frank Woodbury, Secretary Committee on Lunacy of Board of Public Charities.

WOLF, Third Deputy Attorney General, April 15, 1914.

This department is in receipt of your letter of March 19, 1914, requesting an opinion on the question of whether county authorities are entitled to charge the State of Pennsylvania at the rate of \$2.00 per week for each insane criminal maintained in the county insane asylum.

The Act of 25 May, 1897, P. L. 83, provides:

"Any county, municipality, borough, or township of this commonwealth, which now or may hereafter supply, erect and equip a suitable institution for the maintenance, care, and treatment of its indigent insane, upon plans and specifications approved in writing by the Board of Public Charities, shall receive from the state treasury the sum of one dollar and fifty cents per week for every indigent insane person of such county, municipality, borough, or township so maintained."

The Act of 13 May, 1909, P. L. 538, increased the amount of \$1.50 mentioned in the Act of 25 May, 1897, to \$2.00.

Counties, therefore, are entitled to receive from the state \$2.00 a week for every indigent insane person maintained in the county institution. Your question is whether an insane criminal comes within the term 'indigent insane person.'

Whatever might be our judgment on this question in the ab-

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sence of authority, the decision of the supreme court in the case of Trustees of State Hospital, etc., *vs.* Lycoming County, 239 Pa. 402, 1913, requires us to advise you that insane criminals, if they be also indigent, are within the Act of 1909.

In that case the question was whether the trustees of the state hospital were entitled to recover from the counties the entire cost of maintaining criminal insane persons in the state hospitals. The Act of 1 May, 1907, P. L. 153, imposes upon the counties the expense of maintaining indigent insane in state hospitals up to \$1.75 per week, and charges the excess over \$1.75 against the state.

The contention of the trustees of the state hospital was that criminal insane persons were not indigent insane persons, and that the counties, therefore were liable for the entire cost of maintaining criminal insane persons in the state hospital.

The Court of Common Pleas of Dauphin County in a careful opinion by Judge Kunkel, upon which opinion the judgment was affirmed, held that the county was liable only for \$1.75. Judge Kunkel says, in the course of his opinion:

"Manifestly by indigent persons is meant those who have not sufficient means to pay for their care and maintenance themselves, the cost of which therefore would fall upon the county or the poor districts in which they reside. The term 'indigent insane' used in the statute is broad enough to cover all indigent insane persons, whether they be criminal or not. The purpose of the statute was to relieve the local districts from the full cost of maintaining and treating those in insane hospitals who were without means to pay for themselves. It is quite clear, therefore, that insane criminals and such insane persons as are charged with crime, who are indigent, fall within the term 'indigent insane' and are not only within the letter of the statute, but also within its spirit."

By the Act of 26 July, 1913, P. L. 1437, passed subsequent to this decision, an appropriation was made to refund to the several counties the sums which they had paid "for the care, treatment, and maintenance of criminal insane patients in excess of the amounts for which said counties were severally liable."

This statute is practically a legislative declaration of its approval of the decision in the case mentioned, and it seems impossible to make a distinction in the meaning of the words "indigent insane" when used in statutes providing that the coun-

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ties shall contribute to their support in state institutions, and those providing that the state shall contribute to their support in county institutions.

You are therefore advised that county officials are entitled to receive \$2.00 from the state treasury for each indigent insane person, whether criminal or not, maintained in the county institutions.

PAROLE OF CONVICTS.

Parole of convicts—Conviction while under parole.

The words "unexpired maximum term," used in the Act of May 10, 1909, P. L. 495, refer to the time of sentence and not to the time passed under parole.

A person who is returned to the penitentiary, to serve a new term, should serve the new term first and after its expiration be held for the unexpired term of his first sentence.

Attorney General's Department. Opinion to Charles D. Hart, Secretary Board of Inspectors, Eastern State Penitentiary.

WOLF, Third Assistant Deputy Attorney General, April 9, 1914.

This department is in receipt of your letter of April 6th asking our opinion as to the time at which Warren Anderson B5146 will be entitled to discharge.

We understand that Anderson was sentenced on October 25, 1909, to an indeterminate term of from nine months to three years, on a charge of larceny; that he was released on parole October 3, 1910, and was returned to your institution under a sentence imposed February 20, 1911, of not less than fourteen months nor more than ten years, for felonious entry and larceny.

One-third of this maximum sentence will have been served within a short time, and I assume that what you desire to know is whether, if the Parole Board decides at the expiration of one-third of the sentence to parole Anderson, he must be detained for the balance of the term of three years which was not served at the time of his release on parole, and when his parole time will begin to run.

Parole of Convicts.

You are advised by this department in an opinion dated March 15, 1911, that the words "unexpired maximum term" used in the Parole Act of 10 May, 1909, P. L. 495, refer to the time of sentence and do not refer to the time passed on parole, and you were further advised in that opinion that a prisoner released on parole who is returned to the penitentiary to serve a new term should serve the new term first, and after its expiration be held for the unexpired maximum term of his first sentence.

The same opinion was rendered by this department to the warden of the Western Penitentiary on November 24th, 1913.

It is, therefore, clear that when Anderson shall have served his sentence for the felonious entry and larceny he should still be held by your institution for two years and twenty-two days, the difference between the maximum of three years for which he was sentenced first, and the time which he served under that sentence before being released on parole.

The fact that under the provisions of the Act of 19 June, 1913, P. L. 532, Anderson will become eligible to parole under the provisions of the Act of June 19, 1911, P. L. 1055, after having served one-third of his second sentence, does not change the rule.

When Anderson becomes eligible for parole the Parole Board may consider his application entirely irrespective of the fact that an imprisonment of two years and twenty-two days under his first sentence will have to be served after his release on parole under the second sentence.

If the board decides to parole Anderson under his second sentence he will have to serve his two years and twenty-two days. At the expiration of that time he will be released on parole, and that parole will last for so much of the ten years of his second sentence as had not expired at the time that he began to serve the unexpired sentence of two years and twenty-two days under his first sentence.

MOTHERS' PENSIONS.

Mothers' pensions—Expenses—Stationery.

The appropriation of \$500 for furnishings, included in the Act of April 29, 1913, does not cover stationery, postage, and other items of current expense. Such expenses should be paid out of the \$3,000 allowed each year for expenses.

The first expense year, under the Act of April 29, 1913, began on the date of the approval of the act. The second \$3,000 allowed for expenses can only be used for expenses incurred after April 29, 1914.

Attorney General's Department. Opinion to Mrs. Charles Gilpin, Jr., Chairman, Trustees of Mothers' Assistance Fund, Philadelphia County.

WOLF, Third Assistant Deputy Attorney General, April 15, 1914.

This department is in receipt of your letter of April 8th, 1914, asking two questions relative to the appropriation made by the Act of 29 April, 1913, P. L. 118, for the relief of indigent, widowed, or abandoned mothers.

The first question is whether the trustees of the Mothers' Assistance Fund may use, to buy necessary stationery, the additional sum of \$500, which the act allows for the first year "if necessary, for furnishings."

A prior clause of the act provides that the trustees shall provide among other things "suitable furnishings, stationery, and postage," and that the yearly expense of the trustees in cities of the first class shall not exceed \$3,000.

You are advised that such stationery as you need should be purchased from the \$3,000 allowed each year for expenses, and that the additional \$500 for the first year may be used only for furnishings in the limited sense which excludes stationery, postage, and other items of what may be called "current expense."

Your second question is as to the period for which the \$3,000 is allowed.

The act was approved April 29, 1913, and the first money paid out was in February, 1914.

The act carries an appropriation of \$200,000, "one-half of which amount shall be available the first year after approval, and the remainder the second year, or until another appropriation may become available."

Railroad Tariffs.

In view of this language, you are advised that the year to cover the expense of which the first \$3,000 is appropriated, began on date of the approval of the act, and the second \$3,000 can be used only for expenses incurred after April 29, 1914. If, on April 29, 1914, the first \$3,000 shall not have been used, it will lapse and revert into the state treasury, except in so far as binding contracts may have been made prior to April 29, 1914. Payments on such contracts may be made from the first \$3,000, even after April 29, 1914.

RAILROAD TARIFFS.

Railroad tariffs—Changes of rates or schedules—Intra-state rates.

Public Service Commission.

BY THE COMMISSION.

And now, to wit, March 30th, 1914, The Public Service Commission of the Commonwealth of Pennsylvania after public hearing held this day at Philadelphia, determines that any and all changes proposed to be made effective on April 1st, 1914, in tariffs or schedules of intra-state joint rates between trunk and main line railroads and industrial or short line railroads without the statutory thirty days' prior notice to the Commission, in addition to that to the public, are illegal and prohibited by The Public Service Company Law of July 26th, 1913.

The Commission further orders that no common carrier or any other public service company subject to said Act of Assembly shall put into effect any proposed change in tariffs as to intra-state rates without the aforesaid thirty days' prior notice to this Commission (whether by the filing of tariffs with the Commission or otherwise), in addition to the thirty days' prior notice to the public, which notice to the Commission, in addition to that to the public, shall as required by Art. 2, Sec. 1, (f) of said Act of Assembly plainly state the exact changes proposed to be made and the time when such proposed changes will go into effect.

After said notice of change shall have been given to the Commission and shall have been published as required by law as aforesaid, the Commission will proceed to investigate and

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determine in the manner provided by law any complaints as to alleged unreasonableness or unduly preferential or unjustly discriminatory character of such changes in tariffs or schedules.

*COMMONWEALTH vs. HARRY V. PEARCE.**Veterinary surgery—Statutes—Construction—Act of May 16, 1895.*

Filing the teeth of horses to sharp edges and cutting projections therefrom by the use of instruments ordinarily used by veterinary surgeons constitutes veterinary surgery, within the meaning of the Act of May 16, 1895, P. L. 79.

Where the words of a statute are unambiguous they do not admit of construction but must be given their ordinary popular meaning.

Under the Act of May 16, 1895, P. L. 79, the prohibition is against entering upon the practice of veterinary medicine or surgery, without compliance with the act, and the offense is entering upon such practice without such compliance. A conviction cannot therefore be sustained upon an indictment found more than two years after the defendant had entered upon the practice of veterinary surgery without complying with the provisions of the act.

Motion in arrest of judgment and for a new trial. Quarter Sessions Dauphin County, No. 99 January Sessions, 1911.

John Fox Weiss and Ruby R. Vale, for commonwealth.

Fox & Geyer and C. Berntheisel, for defendant.

KUNKEL, P. J., May 4, 1914.

The defendant was convicted of having entered upon the practice of veterinary medicine and surgery, without first having complied with the Act of May 16, 1895, P. L. 79, and without having had a license duly granted to him, as provided in the act. A motion is now made in arrest of judgment and for a new trial, on the ground that the acts done by him did not constitute the practice of veterinary medicine and surgery within the meaning of the statute, and that, as he had been engaged in doing the acts for more than two years prior to March 22, 1911, when the indictment was found, the statutory penalty can not be enforced against him.

(1) The evidence showed that the defendant had adver-

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tised himself as a doctor of veterinary dentistry and was practicing veterinary medicine and surgery in the year 1900, and that during the time covered by the indictment he was engaged in dressing the teeth of horses in the county of Dauphin, his work consisting in filing the teeth to sharp edges and in cutting the projections therefrom which had not worn off by mastication, using for the purpose the same kind of instruments and in the same manner as were used by veterinary surgeons. The instruments which he used were a "tooth rake," which is a sharp instrument on the order of a file and is used by drawing it toward the operator for the purpose of cutting. Other instruments which he used were called tooth forceps, cutters, extractors, and tooth chisels. The defendant contends that the acts thus proven did not amount to the practice of veterinary medicine and surgery. With this contention we cannot agree. Surgery is a branch of medical science and is the use of instruments and appliances upon the body for the purpose of cure. The instruments may be used upon any part of the body and may be characterized as a particular kind of surgery, dependent upon the part of the body upon which they are used. The use of instruments upon the teeth of a human being for remedial purposes is understood to be dental surgery and is so designated, and if instruments be used for such purpose upon the teeth and mouths of horses it is veterinary surgery. The phrase used in the statute is veterinary medicine and surgery and is broad enough to include every branch of veterinary medicine or surgery, howsoever it may be particularized. We think the acts of the defendant as shown by the evidence constituted veterinary surgery.

(2) The defendant was engaged in the practice of veterinary dentistry or surgery more than two years prior to the time the indictment was found, and for this reason it is contended that it cannot be said that he entered upon the practice of veterinary medicine and surgery after that time. The language of the Act of May 16, 1895, is, "From and after the first Monday in September, one thousand eight hundred and ninety-five, no person shall enter upon the practice of veterinary medicine and surgery in the State of Pennsylvania," etc. This contention amounts to a plea of the statute of limitations and involves the construction of the phrase "enter upon the practice." The commonwealth asks us to construe it as though it read no person shall practice veterinary medicine and surgery

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in the State of Pennsylvania after the time stated. If the phrase were open to construction it would be our duty to so construe it as to effectuate the general purpose of the statute, which is to prevent the unauthorized practice of veterinary medicine and surgery. But the phrase does not admit of construction. It is unambiguous. It must be given its popular meaning. To "enter upon the practice of surgery" means to begin to practice or to begin to engage in practice in the common and ordinary acceptance of the term, and the prohibition is against entering upon the practice and the offense is the entering upon the practice and is so charged in the indictment. We have no warrant to construe the phrase so as to extend the prohibition and to enlarge the offense. If the legislature had intended to make the offense that of practicing veterinary medicine and surgery, apt words could readily have been used; but they were not used, and we are not at liberty to incorporate into the legislation that which the legislature has not seen fit to do. Manifestly the legislature assumed that all persons who should enter upon the practice of veterinary medicine and surgery after the time fixed without the required registration and license would be covered by the language used, and that thus the purpose of the statute would be accomplished. The penalty is enforceable against all such persons, provided the prosecution is brought within the time limited by law in such cases. If the prohibition of the statute is not broad enough to completely accomplish the end desired the remedy is with the legislature alone, which may extend it by amendment. We are not prepared to give a meaning to the phrase in question other than that which common usage recognizes. Endlick on Interpretation of Statutes, Section 6.

It is suggested by the commonwealth that what the defendant did two years prior to the finding of the indictment did not constitute entering upon the practice. With equal reason may the same be said of that which he did during the time covered by the indictment, for his acts were substantially the same during both periods of time.

The motion for a new trial and in arrest of judgment is sustained and the verdict set aside and a new trial granted.

EVALINA J. CARLILE *vs.* THE PEOPLE'S BRIDGE COMPANY OF
HARRISBURG, PA.

Negligence—Independent contractor—Contributory negligence.

A corporation operating a bridge for toll can not shift upon a traction company using the bridge nor upon an independent contractor repairing the bridge the responsibility of keeping the bridge, when open, in a safe condition for travel.

Whether a toll bridge is open for general or limited use, it is the duty of the corporation operating it to maintain it so that any one attempting to enter upon it can do so with safety.

An independent contractor was repairing the floor of a toll bridge. Part of the cost of the work was to be paid by a traction company using the bridge and part by the bridge company. The part of the bridge used for ordinary travel was closed. The part used by the traction company was open for the passage of its cars. About fifty feet from the entrance to the bridge, on the right side of the roadway, was a pile of stones and sand on which there was a red light. At the entrance to the bridge, near the partly closed gate, was a pile of stones and earth, and on the partly closed gate a red light. There was an arc light in the street about one hundred and fifty feet from the entrance to the bridge and another a short distance from the entrance, overhead on the bridge. There was a red light at the end of the open gate, but it was doubtful if it could be seen by one approaching the bridge. There was a toll house on the side of the street entering the bridge, the door of which was from six to ten feet from the gate, and on the side of the bridge over which the tracks of the traction company ran. In this house there was a light and a watchman. Plaintiff's husband drove on the bridge with a horse and buggy at night, fell through an opening in the floor of the bridge and was killed. There was a conflict of testimony as to the manner in which he approached the bridge. *Held*, on motion for judgment non obstante veredicto, that the case was for the jury.

Motion for judgment non obstante veredicto. C. P. Dauphin County, No. 395 March Term, 1912.

Chas. H. Bergner and *W. U. Hensel*, for plaintiff.

Robert Snodgrass and *Chas. L. Bailey*, for defendant.

KUNKEL, P. J., May 4, 1914.

This is a motion by the defendant for judgment non ob-

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stante veredicto. The defendant owned and operated a bridge which crossed the Susquehanna River at Walnut Street, in the city of Harrisburg. The plaintiff's husband, on entering the bridge with his horse and buggy at night time, was precipitated through an opening in the floor to the shore below, as a result of which he died. The opening in the floor was made by a contractor, working under a contract for the defendant company. Part of the consideration for the work was to be paid by the Valley Traction Company, which operates its cars upon and over the bridge. By the contract it was stipulated that the work was to be so conducted as to not interfere with the use of the bridge by the Traction Company. There was a double gate at the entrance to the driveway of the bridge. The gate through which the cars of the Traction Company entered was left wide open, while the other gate was closed to the point of not interfering with the passage of the Traction Company's cars. About fifty feet from the entrance to the bridge, on the right side of the roadway, was a pile of stone and sand, on which there was a red light. On the side of the roadway, at the entrance to the bridge near the partly closed gate, there was a pile of stones and earth, and on the partly closed gate there was a red light. There was an arc light in the street about a hundred and fifty feet from the entrance and another a short distance from the entrance overhead on the bridge. There was also a red light at the end of the open gate, but it was doubtful, as the gate opened inwardly, whether it could be seen by one approaching the entrance. There was a toll house on the side of the street entering the bridge, the door of which was from six to ten feet from the gate, and on the side of the bridge over which the car tracks ran. In this house there was a light and watchman or toll gatherer.

It is insisted that the defendant bridge company is not liable for the deceased's death, because the work on the bridge was being done by an independent contractor and as the opening in the floor was made in the course of that work he is therefore liable, and that also as the bridge was kept open for the use of the Traction Company it was its duty to provide against the accident which occurred. To this it is sufficient to say, that the defendant company was a corporation operating the bridge for toll or rental and it could not shift upon the Traction Company or upon any other person the responsibility of keeping the bridge when open in safe condition for travel.

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The defendant was operating the bridge at the time the deceased lost his life. It is true it was operating it to a limited extent, but whether it was open for general or limited use, it was its duty to keep and maintain it so that any one who attempted to enter upon it could do so with safety. The law respecting the duty of the defendant under the circumstances is thus laid down in *Lancaster Avenue Improvement Co. vs. Rhoads*, 116 Pa. 377: "When certain powers and privileges have been specially conferred by the public upon an individual or corporation for private emolument, in consideration of which certain duties affecting the public health or the safety of public travel have been expressly assumed, the individual or corporation in receipt of the emolument cannot be relieved from liability by committing the performance of its duties to another. The rule that in actions for negligence municipal corporations may in certain cases cast responsibility upon an independent contractor whose negligence caused the injury, has never been extended to corporations for profit;" and in the case cited it was further held "An incorporated turnpike company undertaking to lower the grade of its road while in receipt of tolls and the road open for travelers, is bound to guard that part retained for public use and warn travelers of the danger threatened by obstructions and by suitable devices to direct them in the proper route. Of these duties they may not divest themselves by shifting the responsibilities upon others." *Gilmore vs. P. & R. R. R.*, 154 Pa. 375, *Camblin vs. P. W. & B. R. R. Co.*, 218 Pa. 54. The doctrine of an independent contractor, we were of opinion at the time of the trial and still are, was not a defense to this action.

The defendant claims that the deceased was guilty of contributory negligence in attempting to enter upon the bridge when the red light on the stone and sand pile about fifty feet distant from the bridge, the red light on the partly closed gate, warned him of danger, and the arc light behind him and the arc light in front of him, if he had looked, would have shown him the opening in the floor. Whatever inference of negligence might be drawn from the circumstances stated, they were not all the circumstances attending this accident. In addition there was in the case the lighted bridge, the light in the toll house, the open gate at the entrance near it, all of which might have indicated to one approaching in spite of the red lights, that the bridge was open to travel and that the red lights were

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there to mark the line of safe approach thereto. The jury was the only tribunal to determine whether the deceased's attempt to enter the bridge under all these circumstances was an act of negligence. This question could not be decided by the court. The manner of the deceased's approach to the bridge was in dispute, which left the question of his negligence in that respect necessarily to the jury. The defendant's negligence in leaving the gate of the bridge open and unguarded under all the circumstances, which was the negligence charged, was undoubtedly a question for the jury. We think it would have been error to take from it the determination of either of these questions.

The motion for judgment non obstante veredicto is overruled and judgment is directed to be entered on the verdict on payment of the jury fee.

IN RE PETITION OF SCHUYLKILL LIGHT, HEAT AND POWER
COMPANY FOR APPROVAL OF AN ORDINANCE OF THE BOR-
OUGH OF ASHLAND.

*Public Service Companies—Admission to Municipalities—
Competition.*

A certificate of public convenience, by the Public Service Commission necessarily involves the determination by the commission that the purpose for which the certificate is asked is such that its accomplishment will be for the benefit of the public.

The passage of the Act of July 26, 1913, P. L. 1374, known as "The Public Service Company Law," and similar legislation in other states, indicates a general judgment that a reliance upon competition between public service companies to secure adequate service and proper rates has not been successful and that supervision by properly constituted authorities should be substituted.

Long experience has shown that while the temporary effect of competition between public utilities occupying the same territory is to produce lower rates, the final result is the absorption of the one by the other and an increase of rates to cover the expense of warfare between them.

When a light heat and power company has occupied the streets of a municipality for twenty-nine years and has, during that time, served the community upon the whole with approval, and has a plant and

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facilities which enable it to render adequate and proper service, an ordinance authorizing a similar company to occupy the streets of the municipality will not be approved.

Public Service Commission. Municipal Contract Docket, No. 1.

PENNYPACKER, Commissioner, April 9, 1914.

The Schuylkill Light, Heat and Power Company, a corporation of the State of Pennsylvania, presented August 19, 1913, its petition asking for the approval by the Public Service Commission of an ordinance of the Borough of Ashland granting it the right to enter upon its streets and highways of the borough with poles and wires for the purpose of the distribution of light, heat and power, and for the purpose of altering, inspecting and repairing its system of distribution.

The ordinance enacted by the borough councils and approved by the chief burgess, August 11, 1913, provided in substance that the petitioner should be granted the right to enter upon the streets of the borough with poles and wires, doing as little damage as practicable, subject to the regulations of councils with respect to grades, travel, and wires and poles; that the system should be in operation within one year; that light should be furnished to certain departments of the borough free of charge, under the penalty of forfeiture, provided that if similar rights should thereafter be granted to another company the petitioner should only be required to do half of the free lighting; that the petitioner should pay such tax per pole per annum "as is paid by any other company" and paint the poles; that the petitioner should begin operations within three months and file a bond in \$1,000.00 to be forfeited upon failure so to begin; and that the petitioner should within thirty days file an acceptance in writing and pay all expenses. The petitioner filed the bond and acceptance September 10, 1913.

After the presentation of this petition, a protest against the approval of the ordinance and contract was filed by the Eastern Pennsylvania Light, Heat and Power Company. The allegations of this protest were substantially as follows: The protestant was originally incorporated September 13, 1906, as the Palo Alto Light, Heat and Power Company, which name was subsequently changed. The Edison Electric Illuminating Company of Ashland was incorporated April 17, 1884, for the pur-

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pose of supplying light, heat and power to the public in that borough and to corporations and individuals there residing, and in adjacent territory. This corporation was later merged with the protestants. This corporation, until the merger, and since the merger the protestant has, since its organization, supplied light, heat and power to Ashland. The protestant has a pole line nine and a half miles in length, a brick building seventy-one and a half feet long and sixty-three feet wide, with boilers, engines, generators and the necessary equipment. Its plant is adequate to supply all demands. The population of Ashland is about sixty-eight hundred and fifty persons. The rates heretofore charged, which are set forth in detail, are alleged to be just and reasonable and are practically those in force by electric light companies in the State. It is further alleged that there is no necessity for two electric light companies in Ashland and not enough business to warrant their existence in such a way as to give good service.

From the testimony presented at the hearing, the following facts are found:

The Eastern Pennsylvania Light, Heat and Power Company has an adequate plant and has been furnishing electric light to private consumers in all parts of Ashland. It has twenty-three miles of wire and five hundred and fourteen poles erected. It has an existing contract with Ashland for the borough lighting executed in 1908 for a term of ten years. A few complaints, not very serious, have been made with respect to the efficiency of the service, amounting to fifteen in two months' time. The plant is in a position to render, and does render, a complete and sufficient electric light and power service to the borough. No ordinance has been passed by councils giving this corporation authority to put wires and poles through the streets of the borough, but they had been erected for many years without objection, and their existence had been recognized by the borough in making the contract. The charge to the borough was \$85.00 per lamp for each year. The protestant offered to furnish light to the borough of Centralia for \$60.00 per lamp per year, and furnish the light to Frackville and Girardville at that rate. Fifteen years ago there had been two companies furnishing light in Ashland, one to the municipality and one to the citizens, but both had been bought out by the protestant.

The facts in this application raise clearly a question of much importance for the first time in the experience of this com-

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mission. A light and power company which has occupied the streets of a municipality with its poles and wires for twenty-nine years, which has during that time served the community upon the whole with approval, has a plant and facilities which enables it to render adequate and proper service. A light, heat and power company which has no plant, but which has associations with a trolley company whose track runs through the municipality proposes to extend another set of poles and wires through the streets not occupied by the trolley company. An ordinance granting these privileges has been passed and approved by the proper municipal authorities and accepted by the corporation. No doubt it is the expectation of the municipality that by reason of the competition in this way introduced a lesser rate for service will be secured.

Section II, of Article III, of the Act of July 26, 1913, provides that "no contract or agreement between a public service company and any municipal corporation shall be valid unless approved by the Commission," and Section 2, of Article III, of the same act provides that "upon the approval of the Commission evidenced by its certificate of public convenience first had and obtained, and not otherwise, it shall be lawful for any proposed public service company (b) to begin the exercise of any right, power, franchise or privilege under any ordinance, municipal contract or otherwise.

It is plain that the approval of the Commission and the giving of its certificates of public convenience involves the determination by the Commission that the carrying into effect of the proposed contract would be for the benefit of the public. Does it appear that the approval of this contract would result in such benefit? The passage of the Act of July 26, 1913, and of similar acts in nearly all of the other states indicates a general judgment that a reliance upon competition between public service companies for securing adequate service and proper rates has not been successful and that hereafter supervision by properly constituted authorities is to be substituted. Long experience has shown that while the temporary effect of competition between public utilities occupying the same territory is to secure lower rates, the final result is likely to be the absorption of one by the other and then an increase of rates to pay the expenses of the warfare. The experience of Ashland which once had two or three competitive companies all of them absorbed by the strongest is an illustration. The municipality,

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in the case of companies furnishing light, is burdened with the inconvenience and difficulties which arise from the presence of duplicated poles and wires and finally has to pay at least a reasonable return upon the increased capital required by such duplication.

The question always is, by what means can the public convenience be best served. It may well be that occasions will arise when, because of some fundamental defect in the service by the company in the occupancy of the territory due to inadequacy of plant, want of financial strength, or some other reason, the public would be benefited by the introduction of a competing company. Such cases can be determined upon their own merits when they arise. No such difficulties are met with in the present case. The Eastern Pennsylvania Light, Heat and Power Company has occupied the same territory for twenty-nine years. Its plant is adequate. It has supplied the municipality and the people during the entire period with comparatively little complaint. Should its rates be unreasonable, discriminatory or unduly burdensome it is always within the power of the Commission upon proper complaint to control them and afford relief.

The Commission is of the opinion that the introduction into the municipality of the poles and wires of a second company organized for purposes of competition would be at least of doubtful utility. The approval of the ordinance is, therefore, withheld and the application for its approval is dismissed .

ORDER.

And now, to wit, April 9, 1914, the finding, determination, *opinion* and order made by Commissioner Pennypacker *withholding* the approval of the said ordinance, contract between *Schuylkill* Light, Heat and Power Company and the Borough of *Ashland*, and dismissing the application for its approval is *concurred* in, ratified and confirmed, and made the finding, *determination*, opinion and order of the Commission and shall be *filed* as such by the secretary.

IN THE MATTER OF APPLICATION OF RATES AT INTERMEDIATE
POINTS.

Public Service Commission. General Order No. 7.
BY THE COMMISSION, April 18, 1914.

1. In order to provide specific commodity rates on traffic from or to intermediate points, covered by existing published tariffs which only show known points of origin and destination, and to avoid the necessity of special application to the Commission to issue commodity rates from or to intermediate points in special cases upon less than thirty days' notice, common carriers are hereby authorized to apply from or to intermediate points, the same commodity rates as are published from or to the next more distant point named in the tariff, provided such commodity rates are not higher than the published class rates between the objective intermediate points, and provided further that no advance is thereby made in any existing rates.

To accomplish this, supplements must be issued to each tariff providing suitable rule to govern the application of rates from or to the intermediate points. Such supplements may be issued to tariffs of less than three pages, and if desired, one issue may be made to apply as a supplement to all or any of the existing tariffs by making specific reference to each tariff of which the issue is a supplement.

2. The publication of commodity rates from or to other points than the known points of production and consumption imposes an unnecessary burden upon the carrier, as the publication of such rates from or to all intermediate points, would necessitate the posting at every intermediate point, and tariffs would contain numerous rates seldom if ever quoted to shippers.

For these reasons and in order to lessen the claims for reparation resulting from higher charges on an intermediate haul, common carriers are hereby authorized, upon reasonable request therefor, to publish commodity rates on one day's notice to the Commission and to the public, from or to intermediate points which do not exceed those in effect from or to the next more distant point named in the tariff, provided no advance is thereby made in any existing rate.

Each such tariff shall bear on its title page the following notation:

Application of Rates at Intermediate Points.

"By authority of General Order No. 7, issued eighteenth day of April, 1914, The Public Service Commission of the Commonwealth of Pennsylvania, this tariff (these rates) is not (are not) made applicable from (or to) all intermediate points. Upon reasonable request therefor rates which do not exceed those in effect from (or to) more distant points will, under authority granted by The Public Service Commission of the Commonwealth of Pennsylvania, be established from (or to) **any** intermediate point hereunder upon one day's notice to the Commission and to the Public."

Tariffs or Supplements which contain changes made under the authority of this order shall contain reference in the issue as follows:

"Issued by authority of The Public Service Commission of the Commonwealth of Pennsylvania, General Order No. 7, issued eighteenth day of April, 1914."

IN THE MATTER OF FILING TARIFFS WITH THE PUBLIC SERVICE COMMISSION.

Public Service Commission. General Order No. 8.

BY THE COMMISSION, April 9, 1914.

It is hereby ordered, that all public service companies subject to the provisions of The Public Service Company Law, approved July 26th, 1913, including all railroad corporations, canal corporations, street railway corporations, stage line corporations, express corporations, baggage transfer corporations, pipe line corporations, ferry corporations, common carriers, Pullman car corporations, dining car corporations, tunnel corporations, turnpike corporations, bridge corporations, wharf corporations, incline plane corporations, grain elevator corporations, telegraph corporations, telephone corporations, natural gas corporations, artificial gas corporations, electric corporations, water corporations, water-power corporations, heat corporations, refrigerating corporations, sewage corporations, doing business within this state, and also all persons engaged for profit in the same kind of business, within this commonwealth, file with this Commission not later than June 1st, 1914, all tariffs issued by such public service company, which were in effect January 1st, 1914, together with all supplements or

Filing Tariffs with the Public Service Commission.

amendments thereto, or re-issues thereof, and which show prices, charges, rates, fares, tolls or other compensation asked, demanded or received for any service rendered or furnished by such company, and, if a common carrier, showing the method of distribution of trains, cars, vehicles, boats, motive power, or other facilities operated or owned by said common carrier.

Every public service company shall also file with, and as a part of, such tariffs and schedules, all rules and regulations that in any manner affect the said prices, charges, rates, fares, tolls, or other compensation, or the distribution of trains, cars, vehicles, motive power or other facilities.

All such tariffs or schedules shall bear consecutive serial numbers commencing with No. 1 for each public service company, and the serial designation shall bear the prefix P. S. C.—Pa., which may be stamped, typewritten or legibly written by hand thereon.

All such tariffs or schedules shall be forwarded as separate communications (correspondence or tariffs and schedules published on or subsequent to April 1st not to be included in the same package or envelope) and such package or envelope must contain in lower left-hand corner "Tariffs and Schedules issued prior to April 1st, 1914," and be addressed to the Bureau of Rates and Tariffs, The Public Service Commission of the Commonwealth of Pennsylvania, Harrisburg, Penna.

If five (5) or more such tariffs or schedules are filed by any one company, an index thereto shall be furnished, the first portion of which index shall show an arrangement in numerical order, and the second in alphabetical order, by commodity or class of traffic or character of service performed, and if common carriers, shall briefly describe the territory of origin and destination.

The filing with the Commission shall not be construed as an approval of any of the prices, charges, rates, fares, tolls, or other compensation, or the rules and regulations or method of distribution of trains, cars, vehicles, boats, motive power, or other facilities operated or owned by said common carrier, contained in the said tariffs, or as a waiver of any of the provisions of The Public Service Company Law.

It is further ordered: That every schedule filed with the Commission shall be accompanied by a letter of transmittal

Filing Tariffs with the Public Service Commission.

in duplicate, if receipt is desired, printed on paper 8½×11 inches in size, in the following form:

TO THE PUBLIC SERVICE COMMISSION OF THE
COMMONWEALTH OF PENNSYLVANIA,
HARRISBURG, PENNSYLVANIA.

Accompanying schedule issued by the
..... is sent you for filing, in compliance with the
requirements of The Public Service Company Law.

P. S. C. Pa., No.

Supp. No. to P. S. C.—Pa., No.

Effective 1914.

and is concurred in by all carriers named therein as participants, under continuing concurrences or authorizations now on file with The Public Service Commission of the Commonwealth of Pennsylvania, except the following named carriers, whose concurrences are attached hereto:

.....
.....
.....

(Signature of Filing Officer or Agent.)

The original will be retained by the Commission, and the duplicate will be stamped and returned to the filing public service company as receipt for the schedule covered thereby, when accompanied by an addressed stamped envelope or postage sufficient to cover return mailing. When the schedule transmitted is not a joint schedule, the statement as to concurrence or authorization in the letter of transmittal may be omitted or stricken out.

IN THE MATTER OF ISSUING RATES ON LESS THAN STATUTORY
NOTICE.

Public Service Commission. General Order No. 9.

BY THE COMMISSION, April 9, 1914.

It is hereby ordered, that all public service companies subject to the provisions of The Public Service Company Law, approved July 26th, 1913, in applying for special permission, under Article II, Section 1 (f), to issue rates on less than statutory notice of 30 days, make said application in the manner and form prescribed in this order.

Form to be used by public service companies in petitioning for permission to file tariffs on less than statutory notice. This form to be printed on paper 8x10½ inches in size.

.....
(Name of petitioning company.)

.....191...
(Place and Date.)

To the PUBLIC SERVICE COMMISSION
of the COMMONWEALTH OF PENNSYLVANIA,
HARRISBURG.

The
(Name of petitioning company.)

does respectively petition the Commission that it be permitted under Article II, Section 1 (f) to put in force the following rates, to become effective.....days after the filing thereof with the Commission:

(State fully the rates it is desired to put into effect, the articles upon which they are to apply, and the points affected.)

.....
.....
.....

Your petitioner further represents that the said rates above mentioned will be published in Tariff P. S. C. Pa. No. or in Supplement No. to Tariff P. S. C. Pa. No. and will supersede and take the place of the rates on like traffic from and to the points above named which are set forth in Tariff P. S. C. Pa. No. or Supplement No. to Tariff P. S. C. Pa. No. on file with the Commission.

Issuing Rates on less than Statutory Notice.

And your petitioner further bases such request upon the following facts, which present certain special circumstances and conditions justifying the request herein made:

(State fully all the circumstances and conditions which are relied upon as justifying the application, and if based upon rates in effect via other lines, specific reference shall be given to the P. S. C. Pa. numbers of the tariffs of such other line or lines.)

.....

.....

.....

.....

.....

.....

(Name of petitioning company.)

By

(Name of officer. Personal signature required.)

.....

(Title of officer.)

IN RE PETITION OF THE CONSOLIDATED WATER COMPANY FOR
PROCESS TO PREVENT THE BOROUGH OF COUDERSPORT FROM
CONSTRUCTING AND OPERATING A WATER PLANT IN SAID
BOROUGH WITHOUT OBTAINING THE APPROVAL OF THE
COMMISSION.

*Boroughs—Construction of water supply system—Approval of
Public Service Commission.*

A borough which had employed engineers to locate a supply of water for the borough, drilled test wells and authorized an issue of bonds for the purpose of procuring and constructing a water system, prior to January 1, 1914, but had not obtained a written permit from the Commissioner of Health, in accordance with the provisions of the Act of April 2, 1905, prior to January 1, 1914, did not have a water works plant in process of construction, by authority of law, prior to January 1, 1914, and must, before undertaking the work, apply to the Public Service Commission for its approval, in accordance with the provisions of the Public Service Company Law, approved July 26, 1913.

Public Service Commission. Application Docket No. 11.

JOHNSON, Commissioner, April 22, 1914.

Consolidated Water Co. vs. Borough of Coudersport.

The borough of Coudersport, Potter County, Pennsylvania, is now, and since October 15th, 1906, has been supplied with water for domestic and other uses by the Consolidated Water Company which was formed by union of the East Coudersport Water Company, chartered July 26th, 1900, and the Citizens' Water Company which was incorporated February 16th, 1882.

The Consolidated Water Company, under date of January 29th, 1914, has petitioned The Public Service Commission of Pennsylvania to "request the attorney general of this commonwealth, pursuant to the provisions of Section 34 of said act, (Article VI of The Public Service Company Law) to proceed in the name of the commonwealth by injunction, or other appropriate remedy at law or equity, to restrain the borough of Coudersport, its officers, and employees, contractors, sub-contractors and lessees, from proceeding to acquire, construct or begin to operate any plant, equipment or other facilities for the purpose of furnishing water to said borough or to the public in territory of the borough of Coudersport without first obtaining the approval of this Commission therefor."

In support of the petition it was contended by the petitioner in the hearing held by the Commission that the borough of Coudersport had not begun the construction of a water plant prior to January 1st, 1914, and that, not having secured the "written permit to be obtained from the Commissioner of Health" of the commonwealth in accordance with the requirements of Section 3 of the Act approved April 2nd, 1905, entitled "An Act to preserve the purity of the waters of the State, for the protection of the public health," the borough could not legally have begun the construction of the water plant prior to January 1st, 1914.

Inasmuch as the decision of this case hinges upon whether the borough of Coudersport had actually and legally begun the construction of a water plant before January 1st, 1914; it will be well to state what action had been taken prior to that date by the council and officers of the borough.

It appears that the respondent, the borough of Coudersport, on the 18th day of November, 1912, employed Witmer and Brown, engineers with offices in Buffalo, New York, to locate a source for the supply of water for the borough and to prepare plans for a water works system; and on February 15th, 1913, Witmer and Brown reported that the borough could secure water from "Springs tributary to Nelson Run about four

Consolidated Water Co. vs. Borough of Coudersport.

miles from the eastern corporation line of the borough." The water was to be supplied by a gravity system at an estimated cost of \$48,000 exclusive of real estate. This report of February 15th, 1913, also gives a preliminary estimate of the cost (\$43,000 exclusive of real estate) of securing for the borough a supply of water pumped from wells to be sunk on land adjacent to the corporation limits.

April 21st, 1913, the council of the borough adopted an ordinance (No. 200) providing for the submission to the electors of the borough on the 24th of June, 1913, of a proposal to increase the indebtedness of the borough in the sum of \$50,000 "for the purpose of procuring or erecting a water system for said borough." At the election held on the 24th day of June, the proposed bond issue was approved by a vote of 278 ayes and 77 noes, whereupon steps were taken by the borough officials to secure from George W. Daniels and Milton J. Potter, owners of the springs tributary to Nelson Run, control of the water flowing from the springs. Bond in the sum of \$3,000 was on the 28th of June, 1913, tendered to Messrs. Daniels and Potter to compensate them for damages. This bond not being acceptable to the said Daniels and Potter, the counsel of the borough of Coudersport, July 10th, 1913, secured from the Court of Common Pleas of Potter County a decree approving the bond, and ordering it to be filed for the benefit of Daniels and Potter. The plan of securing water from these springs was, however, soon abandoned, it having become evident during the dry weather of the summer of 1913 that the springs would not afford an adequate supply of water.

The plan of securing water from the aforesaid springs having been given up, the borough council by ordinance (No. 201), approved September 15th, 1913, authorized the burgess and secretary "to enter into such contract for drilling such test water wells" and "to enter into such contract for sites for test wells as the council may approve" ——"said contract to be in the nature of an option for well and pump house sites at a rental of not exceeding \$50 per year if the borough elects to exercise the option, and not exceeding \$20 damages per well if the test wells drilled thereunder are abandoned." On the 4th of October, 1913, a contract was made, with Julius S. Colcord giving the borough the right to enter upon the lands belonging to Colcord within and adjacent to the borough limits to "drill thereon one or more test wells, and explore

Consolidated Water Co. vs. Borough of Coudersport.

for a supply of water for the municipal water system." A test well was sunk, a pump house site not far from the well was staked out, and a pipe four inches in diameter was laid from the test well to the pump house site seventy feet distant.

On the 3rd of November, 1913, the borough passed an ordinance (No. 202), which was approved by the burgess on the 8th of November, providing for the issue of \$50,000 of bonds, as authorized by the election held the 24th of June, 1913, "for the purpose of procuring or erecting a water system for said borough," but upon November 29, 1913, before the bonds had been issued, the Court of Common Pleas of Potter County, upon petition of Robert B. Knight and Roscoe S. Bush, granted a preliminary injunction restraining the borough treasurer "from selling the said bonds and applying the proceeds thereof for the purpose of procuring or erecting a water system for the said borough." The preliminary injunction was continued until January 30th, 1914. The injunction was dissolved one day after petition was made to The Public Service Commission by the Consolidated Water Company to request the attorney general of the commonwealth to take steps to prevent the borough of Coudersport from erecting a water plant without first securing from The Public Service Commission a certificate of public convenience.

It is provided by Article III, Section 3, Clause (d) of The Public Service Company Law of July 26th, 1913, which requires municipalities to secure the approval of The Public Service Commission before beginning the construction of a municipal public utility that "any municipal corporation which, at the time this act becomes effective (which was January first, 1914) has, by authority of law, in process of construction any such plant for the rendering or furnishing to the public of any such service, may proceed with and complete the said construction, and begin to operate the same, without the aforesaid approval of the Commission first had and obtained."

Did the borough government of Coudersport have on the first of January, 1914, "by authority of law, in process of construction" a municipal waterworks plant? Prior to January first, 1914, an option had been secured from the owners of a tract of land giving the borough the right to sink wells; one test well had been dug; a pump house site had been staked out; a four-inch pipe seventy feet in length had been laid from the test well to the pump house site; but no definite or

Consolidated Water Co. vs. Borough of Coudersport.

complete plans of the proposed water works had been worked out, no bonds had been issued to secure funds to construct the works, no contract had been let for the execution of the work, and no chemical analysis had been made by or for the borough of the water from the proposed source of supply. It is apparent that the steps taken by the borough of Coudersport prior to January first, 1914, to secure a municipal water works plant had been of a preliminary character such as would ordinarily precede the beginning of the actual construction of the works.

No permit for the construction of a water works plant had been secured by the borough from the Commissioner of Health of the commonwealth prior to January first, 1914.

Section 3 of the Act of April 2nd, 1905, "to preserve the purity of the waters of the state, for the protection of the public health" stipulates that "No municipal corporation, private corporation, company, or individual shall construct water works for the supply of water to the public within the state, or extend the same, without a written permit, to be obtained from the Commissioner of Health."

It is contended by counsel for the respondent that—

"It was necessary for the borough to develop a supply (of water) before it could apply for approval (of the Commissioner of Health).....In proceeding further without the Commissioner's approval the borough authorities were but risking his disapproval and not acting contrary to law. The penalty of the third section of the Act of 1905 is imposed upon the completed plant and its operation without permission."

This is too strained an interpretation of the Act of April 2nd, 1905, to be accepted. Section three of that law goes farther than to prohibit a municipal or other corporation to supply water to the public without a permit from the Commissioner of Health. The act stipulates that no water works for the supply of water to the public within the state shall be constructed without a written permit from the Commissioner, and the law thus seems clearly to make it impossible for a borough government lawfully to devote public funds to the construction of a water works plant without having obtained a written permit from the Commissioner of Health of the commonwealth. Inasmuch as this permit was not secured by the borough officials prior to January first, 1914, it must be concluded that the borough of Coudersport did not have a water works plant, "by authority of law, in process of construction" on the first of Jan-

Consolidated Water Co. vs. Borough of Coudersport.

uary, 1914. If it now be the intention of the borough to construct a water works plant, it must, before undertaking the work, apply to The Public Service Commission of the commonwealth for its approval in accordance with the provisions of The Public Service Company Law, approved July 26th, 1913.

ORDER.

And now, to wit, April 22nd, 1914, the above finding, determination and opinion of Commissioner Johnson is concurred in, and the Commission will enforce compliance with the provisions of The Public Service Company Law in this case in the manner therein provided.

CHELTENHAM SCHOOL DISTRICT.*School district—Power to borrow money.*

The cash balance in the sinking fund, applicable to the payment of the existing bonded indebtedness of a school district, may be deducted from the amount of such indebtedness, in determining the capacity of the district to borrow money, without the assent of the electors.

Attorney General's Department. Opinion to Nathan C. Schaeffer, Superintendent Public Instruction.

CUNNINGHAM, Deputy Attorney General, May 7, 1914.

This department is in receipt of your communication under date of April 7, 1914, enclosing an inquiry addressed to you under the same date by Superintendent of Schools William G. Cleaver, by direction of the board of school directors of the school district of Cheltenham, requesting to be advised with relation to the present power of the school authorities of said district to borrow money for school purposes without the assent of the electors thereof.

I understand the material facts to be that the total assessed value of property, taxable for school purposes, in said district of Cheltenham is \$11,470,580 (two per cent. of which amount is \$229,411.60); that the proper authorities of said district, without the assent of the electors, have heretofore created a bonded indebtedness in the sum of \$210,000, which is the only indebtedness of said district now existing within the prohibi-

Cheltenham School District.

tion of the constitutional provision hereinafter referred to; and that there is now in the sinking fund, created for the purpose of paying said bonded indebtedness, a net cash balance of \$21,511.81, applicable to the retirement of the above mentioned bonds, and which cannot be diverted to any other purpose.

You ask to be advised whether, in ascertaining the present capacity of said district to borrow money without the assent of the electors, the above mentioned cash balance of \$21,511.81 in the sinking fund is to be deducted from the above mentioned amount of bonded indebtedness in the sum of \$210,000, making the net existing indebtedness of said district \$188,488.19, with the result that said district would have a present borrowing capacity of \$40,923.41, without the assent of the electors, or whether such borrowing capacity is merely the difference between two per cent. of the assessed valuation of property, taxable for school purposes (which two per cent., as above stated, amounts to \$229,411.60) and the said bonded indebtedness of \$210,000 namely \$19,411.00.

The question raised by your communication is not affected by the recent amendment to Section 8 of Article IX of the Constitution of Pennsylvania, or by new section, numbered 15 and added to said Article IX, which new section, as you have been heretofore advised, will not become operative with relation to school districts until enabling legislation has been passed.

The fundamental constitutional proposition with reference to this subject is that the debt of any school district shall never exceed seven per centum upon the assessed value of the property therein taxable for school purposes, nor shall any district "incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors thereof at a public election, etc."

Section 8 of Article IX of the Constitution has frequently been the subject of consideration by our Supreme Court, especially with reference to its applicability to the indebtedness of cities and boroughs.

It was said in *Wheeler v. Philadelphia*, 77 Pa. 338, that this section means that "the municipal authorities may increase the debt from time to time until two percentum has been added provided the original debt, with the increase, does not exceed seven per centum."

Cheltenham School District.

In the case of *Brooke, et al., v. Philadelphia*, 162 Pa. 123, it was held that the debt of the city of Philadelphia was properly ascertained by subtracting from its total indebtedness the amount of the certificates of the funded debt of the city held in the sinking fund.

In *Schuldice v. Pittsburgh*, 234 Pa. 90, the question involved was whether the city of Pittsburgh could lawfully negotiate a loan in the sum of eighty-one thousand dollars, without the assent of the electors. It was made to appear in that case that the assessed value of the taxable property, as determined by the last preceding valuation thereof, was \$751,226,965.00 and that two per cent. of the valuation, thus assessed, was \$15,024,539.30. It was averred in the bill filed to enjoin the city from negotiating the proposed loan, that the existing net indebtedness of the city, created without the assent of the electors, was \$15,849,302.91. The city contended that its net indebtedness, incurred without the assent of the electors, was only \$14,043,962.11 and that certain additional deductions should be made from this amount in order to fix its exact net indebtedness. After reviewing the cases construing the constitutional provision in question, Mr. Justice Elkin, speaking for the Supreme Court, said:

"The rule announced in these cases is predicated upon the assumption that the Constitution intended to confer upon municipal authorities the power to create new indebtedness after its adoption, to the extent of two per centum of the assessed valuation without the assent of voters, provided the entire indebtedness, including the increase, does not exceed seven per centum."

The action of the court below in ascertaining the net indebtedness by, inter alia, deducting from the indebtedness set out in the bill all indebtedness created and in existence at the time the Constitution went into effect and also the amount of bonds issued since the adoption of the Constitution for the purpose of refunding an indebtedness created prior to that time, was affirmed by the Supreme Court. Continuing the opinion, Mr. Justice Elkin said:

"It is also contended that bonds and cash in the various sinking funds should not be deducted in ascertaining the net indebtedness. As to bonds so held, the question of the right of the city to deduct has been settled by this court in two well-considered cases: *Brooke v. Philadelphia*, 162 Pa. 123; *Bruce*

Bounties for Killing Noxious Animals and Birds.

v. Pittsburgh, 166 Pa. 152. We see no good reason why moneys paid into a sinking fund for a specific purpose under statutory authority, and which cannot be diverted to any other municipal purpose, should not be deducted in the same manner as bonds so held are allowed to be deducted. The funds referred to in the present case were set apart pursuant to statutory authority and are held for a specific designated purpose. They must be used for the purpose intended and cannot be diverted to general municipal purposes. The funds so held are available assets of the city, intact and ready to be applied in liquidation of outstanding liabilities, for the payment of which these funds are created. Why should they not be deducted? We think they should as did the court below."

This decision of our Supreme Court rules the question raised by your inquiry, and you are accordingly advised that, in the opinion of this department, the proper authorities of the school district in question, in calculating and ascertaining its present net indebtedness, may deduct from its bonded indebtedness of \$210,000 the cash balance in the sinking fund created for the purpose of redeeming its bonds and applicable only to such purpose amounting to \$21,511.81, leaving its existing net indebtedness on account of said bonds \$188,488.19.

BOUNTIES FOR KILLING NOXIOUS ANIMALS AND BIRDS.

Noxious animals—Bounties for killing—Act of July 25, 1913.

The several counties of the commonwealth are legally liable, to persons presenting proper certificates, for the payment of the bounties provided in the Act of July 25, 1913, P. L. 1036, for the killing of noxious animals and birds, and counties so paying must look to subsequent legislative action for their reimbursement.

Attorney General's Department. Opinion to Joseph Kalbfus, Secretary Board of Game Commissioners.

CUNNINGHAM, Deputy Attorney General, March 25, 1914.

This department is in receipt of your communication of March 3d, asking, in substance, to be advised whether, under existing legislation, the several counties of the commonwealth are liable to pay to individuals complying with the provisions of the Act of July 25, 1913, P. L. 1036, the rewards or bounties

Bounties for Killing Noxious Animals and Birds,

provided by said act for the killing within the commonwealth of the noxious animals and birds specified therein.

This Act of 1913 is an amplification of the Act of April 19, 1907, P. L. 60, and supplies that act. It was provided in said Act of 1907, and is re-enacted by said Act of 1913, that persons holding the required certificates of their right to receive a bounty should present the same to the commissioners of the county within which the animal or bird was killed. It is then provided that:

"Upon the presentation of such certificate, in proper form, the commissioners of the county shall give an order for the amount named in such certificate to the person presenting the same, drawn upon the county treasurer directing the payment of the reward or bounty, as provided for in this act; and the county treasurer *shall at once*, upon presentation of said order, pay the same from the *funds in his hands belonging to said county*."

By Section 4 of said Act of 1913 the county commissioners and the county treasurer are required to keep an accurate account of the amounts directed to be paid, and actually paid, in compliance with said orders, and submit the same to the auditor general, who, if he finds the return to be in proper form, is directed to

"draw a warrant in favor of such county, upon the state treasurer, for the amount so claimed and approved; which said warrant, upon presentation to the state treasurer, shall be paid out of the funds which shall hereafter accumulate in the hands of the state treasurer from the fifty per centum of the fees paid for hunters' licenses, as provided by section 12 of the act of assembly" approved April 17, 1913, P. L. 85.

In so far as the matter of providing or designating a fund out of which the counties are to be reimbursed is concerned, the Act of 1913 differs from the Act of 1907. The Act of 1907 contained in its 6th section an appropriation of \$50,000 for the purpose of carrying the provisions of that act into effect. The records of the state departments show that this sum was exhausted prior to May 31, 1909, and that there was no appropriation available for the purpose of reimbursing counties during the appropriation period beginning June 1, 1909, and ending June 1, 1911.

By the Appropriation Act of July 25, 1913, P. L. 1264, the sum of \$50,000 was appropriated to reimburse counties for

Bounties for Killing Noxious Animals and Birds.

moneys paid by them for bounties under the provisions of the said Act of 1907, but no part of this appropriation is available for the payment of bounties arising under the Act of 1913.

It was evidently the intent of the Act of 1913 that the counties should be reimbursed for the payment of the bounties payable under that act out of the funds accumulating in the state treasury from the fees paid for hunters' licenses.

By the 13th section of the said Hunters' License Act of April 17, 1913, P. L. 85, it is provided that:

"All license fees collected under the provisions of this act, and all fines and penalties imposed and collected for violation of any of its provisions, shall be paid to the state treasurer as hereinbefore designated, who shall keep the moneys thus collected as a fund separate and apart, solely for the purpose of wild bird and game protection and for the purchase and propagation of game under the supervision of the Board of Game Commissioners of the Commonwealth of Pennsylvania, and the payment of bounties under the provisions of law. The several purposes to which the fund, so received by the state treasurer, shall be applied, *to be clearly designated by an act of the legislature, either in the general appropriation act or by separate appropriation for the payment of bounties.* It being specifically provided that fifty per centum of any fund returned to the state through or because of the provisions of this act, or so much of said fifty per centum as may be needed, *shall be supplied by the legislature at its biennial sessions to the payment of bounties,* at the rate of one dollar for each mink killed, two dollars for each weasel killed, two dollars for each fox killed, four dollars for each wildcat killed, and such bounty upon other animals or birds as may hereafter have a bounty placed upon them by the legislature of the state; such bounties to be paid upon proof of such killing as is now provided by the law of this commonwealth."

It is expressly provided in this section that the purposes to which the fund therein referred to shall be applied are to be "clearly designated by an act of the legislature, either in the general appropriation act, or by separate appropriation for the payment of bounties," and that "so much of said fifty per centum as may be needed shall be applied by the legislature at its biennial sessions to the payment of bounties," etc.

The legislature at its session of 1913 failed to designate the purposes to which the fund shall be applied, and also failed to

Bounties for Killing Noxious Animals and Birds.

make a specific appropriation of any particular sum of money to the payment of bounties.

So far as your department is concerned, you are advised that there is now no specific appropriation out of which the several counties of the commonwealth may be reimbursed by the auditor general and state treasurer for the amounts paid by said counties out of county funds on account of bounties for the killing of noxious animals and birds. This conclusion does not, however, in any way affect the liability of the several counties to pay the bounties in question. The present situation is exactly similar to the situation existing during the appropriation period beginning June 1, 1909, and ending June 1, 1911.

In the case of *Brink vs. Marsh*, 55 Pa. Super. Ct. 293, the county of Bradford refused to pay a bounty claimed under said Act of 1907, and based its refusal upon the ground that the commonwealth had failed to make any appropriation or provision for the reimbursement of said county.

It was decided by the Superior Court that, under the Act of 1907,

"Payment of bounties are to be made primarily by the county which is to be reimbursed by the state; and the fact that there has been no appropriation by the state will not relieve the county from paying the bounty when a proper scalp certificate is presented."

In the course of the opinion in this case it is said that:

"It is to be borne in mind that the legislature might have imposed absolute liability on the counties without any right of reimbursement from the state. Instead of doing this it provided that the counties should be reimbursed, but provision by adequate appropriation for such reimbursement is not made a condition precedent to the liability of the county."

After citing the case of *Commonwealth, ex rel, vs. Griest*, 196 Pa. 396, in which it was held that the secretary of the commonwealth could not justify his refusal to publish a proposed amendment to the Constitution upon the ground that no appropriation had been made to defray the cost of publication, the opinion proceeds as follows:

"Our conclusion is that the intent and effect of the act are to impose the primary obligation on the county and to impose on the state the duty of reimbursement. But from the very nature of the latter duty, as well as by the express terms of

Dog Tax.

the act, it does not arise until the county has paid; and as was said in the case last cited, it is not to be presumed that the state will not ultimately discharge it."

This decision, of course, was made upon the Act of 1907 but it is equally applicable to the Act of 1913, for, in so far as the questions involved and decided in that case are concerned, the Act of 1913 is merely a re-enactment of the Act of 1907.

You are accordingly advised that the several counties of the commonwealth are legally liable to the persons presenting proper certificates for the payment of the bounties prescribed by the said Act of 1913, and that the counties thus paying said bounties must look to subsequent legislative action for their reimbursement.

DOG TAX.

Dog tax—City or borough taxes—County tax.

The owners of dogs must comply with all the provisions of the Act of June 15, 1911, P. L. 968, in addition to complying with the requirements of borough or city ordinances.

Attorney General's Department. Opinion to Dr. C. J. Marshall, Secretary, State Live Stock Sanitary Board.

Wolf, Third Deputy Attorney General, March 18, 1914.

This department is in receipt of your letter of February 25th, 1914, inquiring whether owners of dogs, in cities or boroughs which have ordinances requiring dog owners to pay the city or borough a dog tax, may be required also to pay a county tax, and secure a county tag, as provided by the Act of June 15, 1911 (P. L. 968), and whether constables may destroy dogs running at large and bearing a city or borough, but not a state, tag.

You are advised that dog owners must comply with the provisions of the Act of 1911, entirely irrespective of what additional requirements there may be imposed by any city or borough ordinances.

The Act of 1911 is an act supplementary to the Act of May 25, 1893 (P. L. 136), which earlier act is entitled: "An act for the taxation of dogs and the protection of sheep."

The paramount power of the state to create, by the taxation

Game Fish.

of dogs, a fund for the compensation of owners of sheep injured by dogs, and in aid of such an act to require dogs whose owners have paid the tax to bear a tag, cannot be restricted by local regulations.

The fact that owners may have to pay two taxes and that dogs may have to bear two tags, a county tag and a local tag, does not militate in any way against the efficiency of the state act.

A similar situation arose when the automobile act of April 19, 1908 (P. L. 217), was passed, requiring automobile owners to procure a license from the state. Prior to that time certain cities, by ordinance, had required automobile owners to obtain city licenses. It was held by the Supreme Court in the case of *Brazier vs. Philadelphia*, 215 Pa. 297 (1908), that the state act and the ordinances could co-exist even though the result of such holding might be that automobiles would have to carry two licenses.

Inasmuch as dog owners who have paid a city or borough dog tax are subject to the requirements of the Act of 1911, upon their failure to obey its provisions, constables have the same right to kill their dogs as to kill dogs upon which no city or borough dog tax has been paid.

GAME FISH.

Game fish—Sale of during closed season.

The sale of game fish within this commonwealth, during the closed season, whether such fish are caught in the waters of this commonwealth or elsewhere, is a violation of the Act of May 1, 1909, P. L. 353.

Attorney General's Department. Opinion to N. R. Buller, Commissioner of Fisheries.

BELL, Attorney General, March 25, 1914.

This department is in receipt of your letter of February 24th, inquiring whether, under the provisions of section 12 of the Act of May 1st, 1909, (P. L. 353), it is lawful to sell, within this commonwealth, fresh trout imported from Norway, the trout being received here sealed hermetically in tin cans and put up in jelly.

Section 12 of the Act of 1909, to which you refer, provides:

Game Fish.

"It shall be unlawful for any * * * person, company or corporation, in this commonwealth, to purchase, sell or expose for sale, any charr, commonly called brook trout, or any species of trout * * * provided that nothing in this section shall be so construed as to prevent any person, company or corporation from selling charr, commonly called brook or speckled trout, or any species of trout, bred or raised artificially, under the provisions of section 11 of this act."

If this were the only section of the Act of 1909 relevant to your inquiry, this department would be bound to advise you that the prohibition therein contained was directed solely to the sale of trout caught within this commonwealth, in view of numerous decisions of our courts, of which reference is made to the following:

Commonwealth *vs.* Wilkinsen, 139 Pa. 298 (1890).

Commonwealth *vs.* Paul, 148 Pa. 559 (1892).

Commonwealth *vs.* Beilstein, 29 Super. Ct. 373 (1905).

Commonwealth *vs.* Biterson, 13 Pa. Dist. Rep. 364 (1904).

Section 13 of the Act of 1909 provides, however, as follows:

"That it shall be unlawful to purchase, sell or offer for sale, or have in possession, any fresh dead game fish, wherever caught, within this commonwealth, or any fresh dead food fish, caught in the waters within this commonwealth, except during the lawful period for catching the same, and the space of six days after each period has expired; Provided, however, that nothing herein shall be so construed as to prohibit the sale of food or game fish artificially propagated by any person or persons, under the provisions of section 11 of this act."

Section 1 of the Act of 1909 classifies as game fish, all species of trout, and section 3 makes it unlawful to fish for or have in possession, the same being killed, any species of trout except lake trout, from August 1st to April 14th, both inclusive, except fish artificially propagated under section 11.

Section 11 authorizes the Department of Fisheries to issue a license to persons or corporations desiring to carry on the business of propagating and selling game or food fish, or the eggs thereof.

The preceding acts for the preservation of fish, notably the Act of May 29th, 1901 (P. L. 302), do not contain any provision similar to that provision of section 13, making it unlawful to purchase, sell, offer for sale, or have in possession, any fresh dead game fish "wherever caught." The words "wher-

Game Fish.

ever caught," especially when considered in conjunction with the words "caught in the waters within this commonwealth," which refers to fresh dead food fish, indicate that the legislature intended thereby to prohibit the sale of said game fish within this commonwealth, during the closed season, whether such fish were caught in the waters within this commonwealth, or elsewhere.

The legality of legislation prohibiting the importation into a state, during the closed season, of fish or game caught outside of the state, was considered and established by the Supreme Court of the United States in the case of *Silz vs. Hesterberg*, 211 U. S. 31 (1908), in which the court says, per Mr. Justice Day, as follows:

"It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another state or country. The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game in the interest of the food supply of the people of the state. We cannot see that such purpose frequently recognized and acted upon is an abuse of the police power of the state."

You are therefore advised that the sale of the imported fish, about which you inquire, would constitute an infringement of the Act of May 1st, 1909.

FIRE MARSHALLS.

Fire marshalls—incompatible offices.

The office of deputy state fire marshal and the office of county commissioner are not incompatible.

Attorney General's Department. Opinion to C. P. Rogers, Jr., Chief Bureau of Accounts, Auditor General's Department.

WOLF, Third Deputy Attorney General, March 26, 1914.

This department is in receipt of your letter of March 10, 1914, requesting an opinion as to the right of Thomas H. Ledden, who has been appointed a deputy state fire marshal, to occupy that position during the period of his service as county commissioner of Elk County.

York County Almshouse.

Article XII, Section 2, of the Constitution of Pennsylvania, prohibits the holding of paid state offices by federal office holders, and concludes: "The general assembly may, by law, declare what offices are incompatible."

Pursuant to this provision, the Act of 15th May, 1874, P. L. 186, was passed, and by its sections certain designated offices were declared to be incompatible. The only reference in this act, or in any other legislation, concerning the incompatibility of offices to county commissioners, is section 7 of the Act of 1874, which provides:

"No county commissioner shall be eligible to serve as a member of the board of health or director of the public schools during his continuance in office."

You are advised that there is no incompatibility in the two offices, and that Mr. Ledden, therefore, is entitled to occupy the position of deputy state fire marshall during his incumbency of the office of county commissioner.

YORK COUNTY ALMSHOUSE.*Almshouses—Control of—York County Almshouse.*

The recommendations of the Commissioners of Public Charities, relative to the improvement of the York County Almshouse, should be made to the directors of the poor of that county and not to the county commissioners.

Attorney General's Department. Opinion to Bromley Wharton, General Agent and Secretary, Board of Public Charities.

BELL, Attorney General, March 27, 1914.

This department is in receipt of your letter of February 27th, requesting an opinion as to whether the county commissioners or directors of the poor of York County are bound to take steps to place the York County Almshouse in proper condition.

The Act of 1 May, 1913, P. L. 149, Section 2, authorizes the Commissioners of Public Charities, whenever they find in an almshouse a condition which, in their judgment, is not conducive to the proper care of the inmates, to recommend to the officers "charged by law with the government of such institutions," such changes as the commissioners deem necessary and proper to correct the objectionable condition, and if their recommendations are not acted upon, the commissioners may

York County Almshouse.

certify the facts, with their recommendation, to the district attorney of the proper county, for proceedings by indictment or otherwise.

I understand that there are conditions in the York County Almshouse which, in the opinion of the Commissioners of Public Charities, require correction. The question is, what officers are "charged by law with the government of such institutions."

You are advised that the Directors of the Poor of York County are the officers referred to in the Act of 1913.

The erection of the York County Poorhouse is provided for by the Act of 6 February, 1804, P. L. 65, which act requires the citizens of York County to elect three directors of the poor and of the House of Employment for the county of York.

Section 4 gives these directors, among other powers, the powers

"to purchase, take and hold any lands and tenements within the said county of York, in fee simple, or otherwise, and erect suitable buildings thereon, for the reception, use and accommodation of the poor of their several townships; to provide all things necessary for the reception, lodging, maintenance and employment of the said poor."

Section 5 provides that the directors of the poor are to make an estimate of the probable expense of purchasing land, erecting and furnishing buildings, and maintaining the poor in York County for one year,

"whereupon the commissioners of York County shall, and they are hereby authorized and required to increase the county tax by one-fourth part of the sum necessary for the purposes aforesaid,"

and to borrow the remaining three-fourths, or, if necessary, to add the whole amount to the county tax.

Section 9 provides that the directors shall, "from time to time, receive, provide for and employ" all poor persons entitled to relief.

Section 11 provides that the directors shall visit the apartments in the House of Employment "and see that the poor are comfortably supported."

There have been a number of acts relating to the York County Poorhouse passed since the Act of 1804. We give herewith a complete list of these acts:

1 April, 1805, P. L. 203.

10 April, 1826, P. L. 321.

York County Almshouse.

- 24 March, 1832, P. L. 171.
- 6 April, 1833, P. L. 205.
- 14 Feb. 1838, P. L. 24.
- 15 April, 1845, P. L. 465, Sec. 20.
- 3 March, 1847, P. L. 206.
- 2 March, 1846, P. L. 74.
- 2 April, 1849, P. L. 321.
- 6 April, 1850, P. L. 378.

None of these acts substantially modifies the Act of 1804.

Of course, there has been general legislation applicable to poor persons in the various counties in the state, commencing with the Act of 8th May, 1876, P. L. 149, and ending with the Act of 4th June, 1879, P. L. 78, which latter act creates poor districts and imposes the duty of governing almshouses therein upon the county commissioners, with the exception contained in section 21, as follows:

"This act shall not be construed to repeal any local act or acts under which poorhouses or homes for relief of the destitute have been erected, or are now managed or controlled."

At the time of the passage of the Act of 1879, a poorhouse had been erected and was being managed and controlled in York County under the provisions of the Act of 1804, and for that reason the Act of 1879 did not affect the government of the York County poorhouse. (See *Commonwealth vs. Summerville*, 204 Pa. 300, 1903.)

Attention is called to the cases of *Brown vs. Gahring*, 18 Dist. Rep. 516, 1908, in which it was said by Wanner, J.:

"An order of relief is also necessary in York County: vide section 9 of the Act of Assembly of February 6, 1804, 4 Smith's Laws 113, under which act a special system was established for the maintenance of the poor in the county of York, which is still in force. * * * All of the paupers of both the city and county of York are supported together in the same manner in the county almshouse, under the provisions of said Act of 1804,"

and *Commonwealth, ex rel, vs. York County Commissioners*, 19 Pa. Dist. Rep. 920, 1910, in which it was decided that no legislation has changed the method for the election of directors of the poor in York County provided by the Act of 1804.

It results from what has been said that the Act of 1804 is in full force and determines the question of the responsibility for the condition of the York County Almshouse.

Installing Jacks on the Cars of Street Railway Companies.

Under the provisions of that act, as above quoted, it cannot be doubted that the duty of providing for the maintenance of the poor in York County rests upon the directors of the poor, nor can it be doubted that the duty to erect an adequate almshouse is necessarily implied from the obligation to maintain the poor.

You are therefore advised that such recommendations as the Commissioners of Public Charities may have to make concerning the condition of the York County Almshouse, should be addressed to the directors of the poor of that county.

IN THE MATTER OF INSTALLING JACKS ON THE CARS OF STREET
RAILWAY COMPANIES.

Public Service Commission. General Order No. 10.

BY THE COMMISSION :

And now, May 21, 1914, it is ordered that each street railway car, engaged daily in operating service upon the surface of streets and highways within this state, be equipped with a jack of a lifting capacity sufficient to raise one-quarter of the total weight of a double truck car, and one-half of the total weight of a single truck car at least eight inches.

It is further ordered that one-half of the cars of each street railway company be equipped in the manner as above described on or before December 1, 1914, and that every car included in the provisions of this order be equipped on or before June 1, 1915.

W. D. MATHESON, ET AL., vs. THE MIDDLETOWN & SWATARA
CONSOLIDATED WATER CO.

Rates—Reasonableness—Return upon property invested.

The plant of a water company was found to be, approximately, \$140,000.00. Its net revenue, without provision for sinking fund or depreciation, was \$7,806.62. Held that the rates charged were reasonable.

Public Service Commission. No. 105.

WRIGHT, Commissioner, May 7, 1914.

The allegation of the complainants is "that the rates charged by the defendant company are unjust, unreasonable, and discriminatory."

The "Middletown Water Company" was incorporated in 1884, or 1885, by residents of the borough of Middletown for the purpose of supplying water to the residents of Middletown. In 1895, the company, as well as an associate company, known as the "Swatara Mills Company," made an assignment for the benefit of creditors, and subsequently, in 1897, the property and franchises were sold for the benefit of creditors and purchased at sheriff's sale by George F. Billmyer and J. M. Smyser, of the city of York, for \$19,075.00 in cash, subject to a mortgage of \$25,000.00, assumed by the purchasers. The purchasers continued to operate the company until late in 1902, during which time they made some improvements, including a "slow sand filtration plant," for the purpose of filtering the water from Swatara Creek. The filter was not satisfactory and was abandoned.

In 1902 Billmyer and Smyser sold the Middletown and Swatara Water Company property for the sum of \$108,462.59, of which amount \$50,000.00 was represented in first mortgage bonds.

The Londonderry Water Company was chartered in April, 1902, for the purpose of supplying water to the residents of Royalton Borough, which is on the other side of Swatara Creek, opposite Middletown Borough. The Londonderry Company acquired springs and water rights known as Round Top and there built a reservoir for the purpose of impounding water from the springs and streams and delivering same by gravity to their patrons in Royalton.

In November, 1903, the Middletown & Swatara Water Com-

Matheson, et al., vs. Middletown & Swatara Consolidated Water Co. pany was merged with the Londonderry Water Company under state laws, under the title of the "Middletown and Swatara Consolidated Water Company." A physical connection was made between the two systems and both Middletown and Royalton supplied by gravity through the Round Top Reservoir.

At that time the Middletown Water Company had a bonded indebtedness of \$100,000.00 and a capital stock of \$100,000.00. The Londonderry Water Company had a bonded indebtedness of \$80,000.00 and a capital stock of \$80,000.00, and subsequently the consolidated corporation placed an additional mortgage of \$20,000.00 upon the combined properties.

It is alleged by the complainants that the capital stock does not represent a dollar invested and has no value, which allegation is assented to by the respondent company.

In 1909 the Board of Health, after investigation, demanded that the company install a mechanical filtration plant and in compliance with that order the company installed its filter and other improvements at an expense of about \$26,000.00.

The complainants had an appraisal made of the replacement value, by Engineer F. H. Shaw, who estimated the cost of reproducing the plants as follows:

The Middletown Water Company,	\$81,437.00
Londonderry Water Company, ...	41,115.00

or a total reproducing value of \$122,552.00

The respondent company produced evidence to show that errors and omissions in the value of material would bring the total value up to about \$140,499.88.

At the hearing no evidence was adduced to show the original cost of the plant, and the additions thereto, nor was any estimate offered. Under the existing rates the average cost per year, per family, is \$11.844. The evidence shows that for the year ending October 1, 1912, for the combined companies the gross revenue amounted to \$12,111.48, and under the new rates, for the year ending October 1, 1913, this gross revenue was increased to \$13,832.84. The evidence adduced by the respondent shows that the charges and expenses incident to the management and operation of the plant for the year ending October 1, 1913, amounted to \$6,783.28, leaving the sum of \$7,806.62, net revenue to the consolidated company, for that year, under

Borough of Aliquippa vs. P. & L. E. R. R. Co. and A. & S. R. R. Co. the new rates of the company, complained against. Without taking into consideration the subjects of sinking fund or depreciation, it would appear from the above that the respondent company, under the new rates, is not receiving a net revenue equal to the legal rate of interest on the value of their plant, nor an income more than is fairly due after deducting the proper charges and necessary expenses incident to the conduct of its business. The complaint in this case should accordingly be dismissed.

ORDER.

And now, to wit, May 7, 1914, the finding, determination and opinion made by Commissioner Wright, dismissing the complaint, is concurred in, ratified and confirmed and made the finding, determination, opinion and order of the Commission, and shall be filed as such by the secretary.

BOROUGH OF ALIQUIPPA vs. P. & L. E. R. R. Co. AND A. & S. R. R. Co.

Railroads—Crossings.

When the facilities for access to a railroad station are such that only about one-third of the people of the town would be slightly better accommodated by the additional facilities asked, the Commission is not warranted in ordering such additional facilities.

Public Service Commission. No. 134.

TONE, Commissioner, April 22, 1914.

In the complaint of the borough of Aliquippa against the Pittsburgh & Lake Erie Railroad Company and the Aliquippa & Southern Railroad Company, it is alleged that the respondents have constructed a large number of tracks through the borough, thereby making the only route to the station unreasonably circuitous, through a subway 700 feet north of the railroad station; that the route from the borough to the station is so indirect and inconvenient that the traveling public are led to cross the large number of tracks near the station, in order to avoid the unreasonably circuitous route, and by so doing endanger their lives; that the station facilities are inadequate and insufficient by reason of the difficulty in en-

Borough of Aliquippa vs. P. & L. E. R. R. Co. and A. & S. R. R. Co.

trance to and from the station; that the Pittsburgh & Lake Erie Railroad has constructed an overhead foot-bridge from its station on the west side of the tracks to its waiting room for north bound passengers on the east side of its tracks, but has not extended this foot-bridge eastwardly overhead the tracks of the Aliquippa & Southern Railroad to the eastwardly side of all tracks.

And the complainant requests that the Pittsburgh & Lake Erie Railroad Company be required to extend the said overhead foot-bridge eastwardly over the tracks of the Aliquippa & Southern Railroad Company to a point east of all existing tracks; and also heat the waiting room on the east side of its north bound passenger track.

The respondents entered into a contract with the borough in November, 1910, providing for the vacation of various streets, the establishing of the grades on certain streets and the paving thereof, the location of its freight house and its passenger station, and the construction of a subway under all its tracks, with new approaches, as streets, leading to said subway, and all work to be done at the expense of the Pittsburgh & Lake Erie Railroad Company.

I find after investigation upon the ground that Aliquippa extends along the railroad north and south about six blocks, and has a width of about three blocks east of the railroad between it and the Ohio River, and a width of one block and some irregular additional widths west of the railroad. The railroad station is located on the west side of the railroad, about opposite the fourth street of the six blocks. The subway is at the third street of the six blocks or at the centre of the town.

The construction of the subway, the paving of the streets, construction and improving of the streets leading to the subway and the new station, are of a most modern and substantial character, and offer every facility for the safety and convenience of passengers as well as a safe route for public travel from one side of town to the other, and was the result of extended study and negotiation by the borough authorities and railroad company.

The overhead foot-bridge petitioned for would somewhat better accommodate about one-third of the town people living south of the station, when they go to and from the station, but the other two-thirds and the travelers visiting the town are now

Borough of Aliquippa *vs.* P. & L. E. R. R. Co. and A. & S. R. R. Co. as well or better accommodated than would be the case by a bridge with its additional steps at each end. The subway leads directly into the main business street of the borough, and most of the passengers without doubt desire or have occasion to go via this street when enroute to or from the station.

The respondent has agreed to attend to the heating of its waiting room located on the east side of its north bound passenger track. Its station is well heated and has all modern facilities and conveniences.

On account of the extensive and comprehensive improvements made by the railroad company, comprising both street improvements performed by it for the borough, and complete modern station accommodations for passengers, and of the fact that the greater portion of the people now have a direct route to the station, and the other portion have a comparatively short additional walk between the borough and the railroad, I find that the existing facilities are reasonably adequate, and that an additional foot-bridge will not be necessary, until at least there has been a very material increase in the population of the southern portion of the borough.

ORDER.

And now, to wit, April 22, 1914, from a consideration of the complaint and answer, and the investigation and finding made by Commissioner Tone in this case, the Commission is of the opinion that reasonable ground does not exist for further investigating said complaint or holding a formal hearing thereon and the complaint is accordingly hereby dismissed, and this order directed to be filed by the secretary.

WALTER S. IVINS, ET AL., vs. PHILADELPHIA AND READING
RAILWAY COMPANY.

Railroad station—Change of location.

Public Service Commission. No. 136.

BY THE COMMISSION, April 22, 1914.

The petitioners ask to have the station at Fortuna removed from its present location to a point about one-third of a mile further north, to the northeast corner of the Hatfield Road and the Doylestown Branch of the Philadelphia & Reading Railway Company's railroad. They offer to furnish the lot and to pay the expense of the erection of a new station building. The respondent railway company raises no serious objection to the proposed removal. Commissioner Pennypacker made a personal inspection of the locality and heard all the parties concerned. He reported that the Hatfield Road is a main road through that part of the country, that a few people will be more or less incommoded by the proposed change, but that a much larger number of people residing in the locality will be better accommodated should the request of the petitioners be granted.

And now, to wit, April 22, 1914, it is ordered that Fortuna Station on the Doylestown Branch of the Philadelphia & Reading Railway, be removed from its present location to a point at the northeast corner of Hatfield Road and the railway, at the intersection of these roads.

THE MONONGAHELA CONNECTING RAILROAD COMPANY *vs.* THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE BALTIMORE AND OHIO RAILROAD COMPANY, AND OTHER TRUNK LINE CARRIERS.

THE UNION RAILROAD COMPANY *vs.* THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, AND OTHER TRUNK LINE CARRIERS.

SHIPPERS LOCATED ALONG THE LINES OF THE MONONGAHELA CONNECTING RAILROAD COMPANY AND THE UNION RAILROAD COMPANY IN THE PITTSBURGH DISTRICT *vs.* THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE BALTIMORE AND OHIO RAILROAD COMPANY, AND OTHER TRUNK LINE CARRIERS.

Common carriers—Short lines—Rights and duties.

Under the laws of Pennsylvania, as declared by the Supreme Court of the state, the Union Railroad Company and the Monongahela Connecting Railroad Company are common carriers, with all the rights and subject to all the duties of common carriers, and not mere plant facilities to certain industries located along their lines, as decided by the Interstate Commerce Commission, in the Industrial Railways Case

Public Service Commission. No. 193.

BY THE COMMISSION, May 14, 1914.

In the matter of the proposed cancellation by the respondents hereinafter named of through or point rates with, or allowances to, the Monongahela Connecting Railroad Company and the Union Railroad Company, proposed to become effective May 15, 1914, of thereafter, complaints were filed by said the Monongahela Connecting Railroad Company and the Union Railroad Company and certain shippers located along the lines of said last mentioned companies, in which it was in substance complained that said proposed cancellations of tariffs involved such an increase in rates to said shippers as was unjust and unreasonable and a withdrawal cancellation of joint rates between common carriers contrary to the law of Pennsylvania.

Upon the hearing of these complaints, in the course of the investigation by the Commission, pursuant to due notice, the

y. Co. v. Pittsburgh & L. E. Rwy. Co., et al.

ers rested their case upon the opinion
er Commission as of January 20,
1881, which opinion was the result
at Commission in the so-called "In-
and in which opinion it was held that
Monongahela Connecting Railroad Com-
road Company, were to be regarded
of certain industries located on their
d, and that as such, participa-
oint rates established by the respon-
r allowances made to them by said
ful as in effect constituting rebates,
law relating to interstate com-
merce.
resented by complainants and by re-
sion at the above mentioned hearing,
t under the law of the Commonwealth
rmined by the Supreme Court of the
on Railroad Company is a public or
d of all the rights and subject to the
uties of such public or common car-
atus of the Monongahela Connecting
ame.

en to the opinion expressed by the re-
mission that consideration and fully
erly entitled, and although we state
y of uniformity of federal and with
may be maintained consistently
ealth, the Commission is of the opin-
variance with that of the Supreme
ennsylvania with respect to the legal
road companies would not be justified.
e Commission, no evidence has been
arrant the Commission in finding that
e respondents and the complainants,
ecting Railroad Company and the
y, or the division of said joint rates
ut, as heretofore for many years es-
, are unjust or unreasonable or un-
unduly preferential, and the Commis-
es no opinion at this time as to the
ess of the amount of such divisions
e duties of railroad common carriers

And now, to wit,
ing to law of the ca-
recting Railroad Com-
and shippers located
road companies, it is
a said hearing that t
tariff, cancelling prior
drawing allowances to,
Connecting Railroad Co.
pany, are not justified, and
And it is accordingly o
respondents, the Baltim
The Railroad Company, and
ing to cancel joint tariffs
The Monongahela Connect
ing Railroad Company, sh
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able to such traffic which
prior to the proposed
proposed cancellations
all said respondent common
joint through rates, divis
interstate traffic until the
secretary will file this opini

Monongahela Connecting Rwy. Co. v. Pittsburgh & L. E. Rwy. Co., et al. under the law of Pennsylvania is to establish just and reasonable joint rates and divisions thereof for through service over connecting lines of railroad. Such joint rates, divisions and allowances have not been shown by the evidence presented to this Commission to be unlawful as to intra-state traffic.

Further, the record as it now stands does not disclose that there is sufficient evidence to warrant the finding that the increase in rates to shippers involved in the proposed cancellation of joint rates for the same service as heretofore established would be just and reasonable.

The reasons for the conclusions reached by the Commission as above stated will be set forth more at length in an opinion which will be hereafter filed in this case.

ORDER.

And now, to wit, May 14, 1914, after full hearing according to law of the complaints filed by the Monongahela Connecting Railroad Company and the Union Railroad Company and shippers located along the lines of said complainant railroad companies, it is determined from the evidence produced at said hearing that the proposed changes by means of the tariffs cancelling prior established joint rates with or without drawing allowances to, the complainants, the Monongahela Connecting Railroad Company and the Union Railroad Company, are not justified, and should not therefore go into effect.

And it is accordingly ordered that as to intra-state traffic the respondents, the Baltimore & Ohio Railroad Company, the Pennsylvania Railroad Company, and the Pittsburgh & Lake Erie Railroad Company, and all other trunk line carriers proposing to cancel joint tariffs covering such traffic to and from said The Monongahela Connecting Railroad Company and The Union Railroad Company, shall not charge, demand, collect or receive rates or charges other than those contained in tariffs applicable to such traffic which were in force and effect immediately prior to the proposed effective date of cancellation, all such proposed cancellations hereby being declared void, and all said respondent common carriers shall continue the existing joint through rates, divisions and allowances on said intra-state traffic until the further order of the Commission. The secretary will file this opinion and order of record in the case.

COMMONWEALTH OF PENNSYLVANIA EX REL. JOHN C. BELL,
ATTORNEY GENERAL, vs. A. W. POWELL, AUDITOR GENERAL,
AND ROBERT K. YOUNG, STATE TREASURER OF THE
COMMONWEALTH OF PENNSYLVANIA.

*Mandamus—Parties—Amendment of Writ—Constitutional
Law—Act of July 7, 1913.*

The enforcement of the Act of May 31, 1911, P. L. 468, is a public duty and the Attorney General is the proper relator in a writ of mandamus to compel compliance with its provisions.

When the action of two public officers is required to accomplish the result sought by a writ of mandamus, they may be joined as defendants in the writ, even though joint action is not required of them. With all parties empowered to act before the court, the court can so frame its orders as to require appropriate several action from each and give the necessary relief in a single action.

The general rule is that amendments will be allowed at any stage of a proceeding, if no new cause of action is introduced, and the opposite side is not prejudiced thereby.

An amendment to a writ of mandamus, that relates to the duties of the defendants and asks that a writ may be directed to each of them severally, commanding him to perform the duties resting upon him with respect to the matters in question, does not change the cause of action and is properly allowed.

By the Act of May 31, 1911, the legislature intended that the State Highway Department should be entirely under the control of the State Highway Commissioner, his assistants and employees.

The Act of July 13, 1913, P. L. 672, is valid legislation and its tenth section specifically appropriates moneys derived from registrations and licenses of moter vehicles to the Highway Department.

Mandamus. C. P. Dauphin County, No. 14, Commonwealth Docket, 1914.

John C. Bell, Attorney General and *Wm. M. Hargest*, Second Deputy Attorney General for plaintiff.

M. Hampton Todd, *Thomas A. Crichton*, *C. P. Rogers*, *John B. Echenauer* and *Watson & Freeman* for defendants.

McCARRELL, J., June 8, 1914.

Upon the return of the writ of alternative mandamus issued in this case, the defendants filed motions to quash. They alleged that the Attorney General was not the proper party to

Commonwealth vs. A. W. Powell, et al.

begin the proceeding under the Act of June 8th, 1893, P. L. 346. The fourth section of this Act provides that "When the writ is sought to procure the enforcement of a public duty the proceeding shall be prosecuted in the name of the Commonwealth on the relation of the Attorney General." The same section in its second proviso declares "That when said proceeding is sought to enforce a duty affecting a particular public interest of the State, it shall be on the relation of the officer entrusted with the management of such interest." The defendants, therefore, in their motion to quash claim that the proceeding should have been commenced by the State Highway Commissioner.

The purpose of the present proceeding is to require the payment of money alleged to have been specially appropriated for the use of the State Highway Department by the Act of July 7, 1913, P. L. 672. This Act appropriates all registration and license fees received from automobile owners to the State Highway Department, and provides that the same shall be paid by the State Highway Commissioner into the State Treasury for safe keeping, and shall be paid out upon the requisition of the State Highway Commissioner. The construction, maintenance and improvement of the highways of the State is a matter of great public importance and is of general public interest to all citizens.

In *State Highway Commissioner vs. Chambersburg Turnpike Company*, 242 Pa. 171, in which the State Highway Act of May 31, 1911, P. L. 468, was held not to be local or special legislation, Justice VonMoscisker uses the following language:

"Each of these highways is *ex necessitate* local so far as the situation of any portion is concerned, but each as a whole may be considered state wide, for it is built and maintained for the use and benefit of all the people of the State and its location is merely incidental to the great system of which it forms a part; the legislation for the up-building of this system deals with a matter of general concern and it is not made local or special by reason of the designation of the 296 routes specified in the Act."

In *Commonwealth vs. Matthews*, 210 Pa. 372, which was a mandamus to compel the State Treasurer to pay warrants drawn by the Auditor General for increased judicial salaries, in answering the objection that the Attorney General had no right to appear as relator because no public duty was involved,

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Justice VonMoschzisker, then presiding in the Court below, used the following language:

"If the people of the State in their sovereign capacity are interested in the performance of a public duty to the extent of a common injury, either actual or threatened, in case the duty is not performed, then the community as a whole is the party interested, and as the business of the public is carried on by officers selected by the people, it is the duty of these agents to see that the wrong is righted or the threatened injury averted, and the attorney general is one of the officers specially charged with the duty of representing the public in the litigation."

In the case of *Commonwealth Ex. rel. Attorney General vs. Rowe*, 33 Pa. C. C. 1, a writ of mandamus was asked on the relation of the Attorney General to compel the defendants, who were connected with the schools of a district to refuse admission to a girl who had not been vaccinated and had not had the small pox. The Commissioner of Health under the provisions of the Act of April 27, 1895, P. L. 312, is directed "To protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease." It was contended that the Commissioner of Health should have been the relator in that proceeding. President Judge Gillan declined to adopt this view and said:

"We think in view of what was said by the Supreme Court with reference to the Act of June 18, 1895, P. L. 203, in *Stull vs. Reber*, 215 Pa. 160, that this proceeding is not brought to enforce a particular public interest of the State. If it be said that the proceeding is to enforce a particular public interest of the State, and that particular public interest be the health of the school children of the State, the reply is in the language of Chief Justice Mitchell, in *Stull vs. Reber*, *supra*, 'What bearing it has on the school or school districts is altogether incident to them as constituents of the community.' The Act under consideration is an exercise of the police power of the State. The enforcement of it is a public duty, and therefore, by the very words of the Act of June 8, 1893, P. L. 346, the writ is to be prosecuted in the name of the Attorney General."

So here it may be said that the enforcement of the Act of 1911 is a public duty, affecting all the people of the State. They are interested in having the highways kept in proper re-

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pair by constant attention, and prompt action whenever any defect, however slight, appears, so that roads may be safely used, and the increased cost of repairs, arising from failure to repair promptly, may be entirely avoided. Thus a public duty arises, in the prompt performance of which all the people are concerned, and the Attorney General is the proper relator to enforce this performance, by insisting that money appropriated for the use of the Highway Department shall not be withheld from those entitled thereto.

The motion to quash further alleges that the defendants are improperly joined, that they are not required to act jointly with respect to the matters alleged in the petition, and cannot be sued jointly. Even if they are not required to act jointly, the action of both is required before money can be obtained from the State Treasury. It is well settled by numerous decisions that where this is the case all parties whose action is required in order to accomplish the result aimed at in the proceedings may properly be made defendants therein. When all parties empowered to act are brought before the court the orders can be so framed as to require separate action according to the several legal duties imposed, and in this way in a single proceeding relief can be given.

In the case of *Commonwealth, Ex rel. Green vs. Gregg*, 161 Pa. 582, the Auditor General and State Treasurer were joined as defendants.

In the case of *Cheltenham Trust Company vs. Blankenburg and Ryan*, 241 Pa. 394, the defendants were the Mayor and City Solicitor of Philadelphia. They were required by statute to take certain separate steps in regard to proceedings for the assessment of damages, and their joinder as defendants was approved.

In *Cunningham vs. Dunlap, Mackey and Walton*, 242 Pa. 341, a peremptory writ of mandamus was issued requiring Dunlap, Chief of the Bureau of Water to draw his warrant, requiring Mackey, Director of the Department of Public Works to approve the warrant, and Walton, City Controller, to countersign the warrant.

The principle upon which these decisions rest is well stated in *County Commissioners vs. United States*, 112 U. S. 217 (28 Law Edition, 698). Mr. Justice Matthews in delivering the opinion of the Court says:

"It can make no difference in principle that in a particular case the law instead of casting the performance of the entire

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duty upon a single person has divided it among several, each to perform but one act in its entirety and each acting independently and not as responsible to any of the others, but all required to co-operate in the attainment of the single result and by a continuous and uninterrupted succession so as to preserve the integrity and unity of the performance as an entire duty. The relator is entitled to an effective writ and he can have it only on the terms of joining in its commands all those whose co-operation is by law required, even though it be by separate and successive steps in the performance of those official duties, which is necessary to secure to him a legal right; otherwise the whole proceeding is liable to be rendered nugatory and abortive, for the levy and collection of a tax is not only an entire thing although accomplished by successive steps and separate officials, but is a continuous transaction, each one taking it up where his predecessor left it, and if the relator was compelled to obtain a separate mandamus against each person charged with the performance of a civil service the very delay and break in the continuity of the process might be by the terms of the law itself a sufficient answer to each succeeding writ, and if it were not it would prolong the proceeding to such suspended length as to deprive the writ of the very character of the remedy."

In *King vs. Mayor of Abbington*, 1st L. D. Raym. 559, Chief Justice Holt uses the following language:

"There have been a hundred writs directed to the Mayor and Alderman of London in cases of acts to be done by them separately."

The motion to quash also alleged that the petition showed that it was intended to control the discretion of the officials named as defendants. We are of opinion that no such purpose is disclosed by the petition when compared with the provisions of the Act of July 7, 1913, the provisions of which it seeks to enforce. The motion to quash was therefore overruled and the defendants directed to answer. Robert K. Young, the State Treasurer filed an answer, while A. W. Powell, Auditor General, declined to do so. A motion for judgment against him was then made by the Attorney General. Upon the answer of Mr. Young a jury trial was had on May 11th, 1914, resulting in a special verdict covering the facts put in issue by the answer and traverse.

The first paragraph of the special verdict finds that on December 9th, 1913, Edward M. Bigelow, was the Highway Com-

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missioner and the defendants were respectively the Auditor General and the State Treasurer of the Commonwealth of Pennsylvania.

The second paragraph of the verdict finds that between December 9, 1913, and February 16, 1914, Edward M. Bigelow, received as such Commissioner, pursuant to the provisions of the Act of July 7, 1913, P. L. 672, from day to day sums aggregating \$591,739, of which sum \$192 was paid to him as fees for bulletins furnished pursuant to the provisions of section 11 of said Act, and the sum of \$25 paid to him as fees for new tags or badges issued pursuant to the provisions of section 7 of said Act.

The sixth paragraph of said verdict finds that "Robert K. Young, placed all the sums deposited as aforesaid by Edward M. Bigelow, State Highway Commissioner to the credit of an account designated on the books of original entry of the Treasury Department as "Licenses" and on the balance ledger as "Automobile money received from E. M. Bigelow" and reported a daily balance to the credit of said account to A. W. Powell, who placed the same to the credit of an account designated on the books of the Auditor General's Department as "Automobile license fees."

The seventh paragraph of the verdict is as follows: "On February 16th, 1914, there was to the credit of the account of licenses upon the books of the Treasury Department and of the Auditor General's Department the sum of \$591,739, of which sum \$591,547 had been received by Edward M. Bigelow, State Highway Commissioner, for registration and license fees paid to him pursuant to the provisions of the Act of July 7, 1913, P. L. 672, other than as fees for bulletins furnished under to section 11 of said Act, which bulletin fees amount to \$192."

The eighth paragraph of the special verdict finds that on January 16, 1914, the sum of \$1,035 was due and owing by the Commonwealth of Pennsylvania to the National Limestone Company for crushed stone sold and delivered at fair and reasonable prices to the State Highway Department pursuant to the orders of the State Highway Commissioner, which stone was necessary for use in the repair of and was actually used by the State Highway Department to repair road No. 161, which was and is part of the system of State highways as described and determined by the Act of first June, 1911, P. L. 468.

The ninth paragraph of the verdict finds that on February 16, 1914, the State Highway Commissioner, presented his requi-

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sition upon the Auditor General for the sum of \$1,035 to be paid to the said National Limestone Company for said stone, said sum to be charged to the fund derived from registration and license fees, paid under the provisions of the Act of July 7, 1913.

The tenth and last paragraph of the verdict is as follows:

"R. K. Young, State Treasurer, refused and still refuses to pay any warrant based upon said requisition in favor of said National Limestone Company, for the reason that he denied and still denies the constitutionality of the tenth section of the Act of July 7th, 1913, P. L. 672."

On May 15th, 1914, the Attorney General moved to amend the petition and writ by striking from the petition and writ the second, third and fourth paragraphs of section seven thereof, and substituting other paragraphs therefor. These amending paragraphs define the official duty of the Auditor General and State Treasurer in accordance with the provisions of the tenth section of the Act of July 17, 1913, allege that they have failed to perform these several duties, and therefore prays that a mandamus may issue commanding the said A. W. Powell, Auditor General, to draw his warrant upon the said R. K. Young, State Treasurer, for the sum of \$1,035 in favor of the National Limestone Company, as specified in the requisition of E. M. Bigelow, State Highway Commissioner, dated February 16th, 1914, and commanding the said R. K. Young, State Treasurer, to draw his check for the sum of \$1,035 in favor of the National Limestone Company, and to deliver said check to National Limestone Company as specified in the said requisition of Edward M. Bigelow, State Highway Commissioner, charging the said sum of \$1,035 against the fund received from registration and license fees under the Act of July 17, 1913, P. L. 672.

The proposed amendments do not, in our opinion, change the cause of action. The genral rule is that amendments will be allowed at any stage of a proceeding if no new cause of action is introduced, and if the other side is not prejudiced thereby. Numerous decisions of our own and other courts to this effect might be cited. The case of *Neubert vs. Armstrong Water Co.*, 211 Pa. 582, is somewhat similar to the present case so far as regards the nature of the amendments, and in that case Mr. Justice Elkins uses the following language:

"The original petition and the amendments made thereto contain ample averments to support the proceedings in the

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court below. It is complained, however, that the amendments were not properly permitted or directed to be made by the learned court, and that without these amendments there were no sufficient jurisdictional averments. The prayer of the petitioners did not specifically ask for an inspection of the books and papers for the purpose of ascertaining the value of the shares of stock, and it is argued by the appellants that the act or duty to be performed is the inspection of the books and papers for this purpose, and therefore the averments conferring jurisdiction were not properly set out. In this connection, however, it will be observed that each of the seven prayers was intended to ascertain facts, all of which either showed or tended to show the value of the stock, and this was the manifest purpose of the petitioners, known to and conceded by the appellants throughout the trial. The learned trial judge was so impressed with this view of the case that he directed the petition to be amended so as to include a prayer for this purpose. The trial before the jury by consent and agreement of counsel for both parties proceeded entirely upon this theory and it would be sticking in the bark to hold that the irregularity complained of, if such it be, could now be seized upon to defeat the plain purpose of the whole proceeding. Courts will not be astute to sustain technical objections to the course of procedure in the trial of causes where they have been disposed of on their merits and no substantial injury has been done the complaining party."

The amendment proposed here relates simply to the alleged duty of the respective defendants and prays for relief by asking that a writ be directed to each of the defendants, severally commanding him to perform the duties resting upon him with respect to the matters in question. The cause of action is not changed, the proposed amendments appear to us to be entirely proper and indeed necessary, and are therefore allowed.

This brings us to the consideration of the principal question in the case, to wit: Is the Commonwealth entitled to the writ here prayed for? The Commonwealth claims that the tenth section of the Act of July 7, 1913, P. L. 672, is clear and explicit and that a peremptory writ should issue to enforce compliance therewith. The Auditor General and State Treasurer contend that this Act is unconstitutional, and they are therefore unwilling to act under it until its validity is judicially determined. They have the right to ask a judicial decision. This tenth section is as follows:

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"The moneys derived from registrations and from license fees under the provisions of this act shall be paid by the State Highway Department into the State Treasury, for safe-keeping; and shall by the State Treasurer be placed in a separate fund; to be available for the use of the State Highway Department upon requisition of the State Highway Commissioner. All such moneys hereafter paid into the State Treasury are hereby specifically appropriated to the State Highway Department, for the purpose of assisting in the construction, maintenance, improvement, and repair of State Highways and State-aid Highways, as described in the act creating the State Highway Department, approved the thirty-first day of May, Anno Domini one thousand nine hundred and eleven. The Auditor General shall upon requisition, from time to time, of the State Highway Commissioner, draw his warrant upon the State Treasurer for the amount specified in such requisition, not exceeding, however, the amount in such fund at the time of making such requisition."

The Act of May 31, 1911, P. L. 468, creates the State Highway Department as a new department of the State government. It provides for the appointment of a State Highway Commissioner and of two Deputy State Highway Commissioners, of an auditor, who shall be an expert accountant and a certified public accountant under the laws of the Commonwealth, of a chief engineer, who shall be experienced in the building and maintenance of improved roads, of an assistant to the chief engineer, experienced in the designing and construction of bridges, and fifty superintendents, experienced in the construction and maintenance of improved roads, who shall be known as superintendents of highways. The State Highway Commissioner is authorized to appoint additional assistant engineer draughtsmen, who shall also be civil engineers, a chief clerk and additional clerks, stenographers, bookkeepers and other employees. The State Highway Commissioner is empowered to make and adopt rules and regulations for conducting the business and work of the department and to prescribe the duties of all appointees and employees. He is further authorized and empowered to purchase all machinery, implements, tools and materials of any and every kind incident to and necessary in the construction, building, repairing and maintenance of the State Highways, and to purchase and maintain at the expense of the department wagons and other vehicles, including horses, mules and harness to be used

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only in connection with the work of the department. Two hundred and ninety-six routes of highway are specified and placed under his care. He is required to give bond in the sum of \$50,000, and is clothed with large powers with respect to the highways of the Commonwealth. By the fifteenth section of the Act every contract authorized to be made by the State Highway Commissioner for the reconstruction or improvement of State Highways shall first be approved by the Governor and shall be made in the name of the Commonwealth of Pennsylvania, and shall be signed by the State Highway Commissioner and approved as to form and legality by the Attorney General or Deputy Attorney General of the Commonwealth. By the twentieth section it is provided as follows:

"For the purpose of uniform, efficient and economic maintenance and repair of the State Highways, herein described and defined, the said State Highway Commissioner shall purchase all necessary material, and shall appoint and employ labor or repairmen, who shall at all times in the year keep the State Highway free from holes, ruts, sticks, loose stones, or other impediments of any kind, which tend to interfere with free and easy travel, or which if permitted to exist might tend to the deterioration, injury or destruction of the highway."

Apparently the legislature intended that the State Highway Department should be entirely under the control of the State Highway Commissioner, his assistants and employees, who are charged with the performance of most important public duties, requiring constant attention.

The Act of July 7, 1913, P. L. 672, regulates the use of the highways by motor vehicles, and in the section heretofore quoted appropriates the moneys derived from registration and license fees to the State Highway Department, directing that these moneys shall be paid into the State Treasury for safe-keeping and shall be paid out on the requisition of the State Highway Commissioner. The language of the statute is very clear, and the State Highway Commissioner has deposited the moneys received by him from registrations and licenses in the State Treasury, as directed by the Act. The petition avers in its sixth paragraph that the Highway Commissioner paid into the State Treasury for the year 1914 and prior to February 16, 1914, the aggregate sum of \$591,739. This averment is undenied by the Auditor General, and has been found to be the fact by the jury which tried the case as to the State

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Treasurer. The fact that \$192 of this sum appears to have been derived from sale of monthly bulletins and \$25 from the issuing of duplicate tags does not appear to us to be of controlling importance at the present time. There is undoubtedly much more money in the State Treasury appropriated by the Act of July 7, 1913, than is necessary to pay the requisition issued by the State Highway Commissioner in this case. The Act requires the State Highway Commission to print monthly bulletins, giving name and address of each applicant for license, together with the number of license issued to said applicant. These lists are to be furnished free to mayors, burgesses, police magistrates, chiefs of police, aldermen and justices of the peace in order to enable them to enforce the regulations of the law, and may be sold at a nominal fee to other applicants for the same. The tag is issued along with the license, no separate charge being made therefor, and the duplicate tag is issued in case of the loss of a tag and is given another number than that of the lost tag, and for the tags thus issued to replace lost ones a fee of \$1.00 is charged. Whether or not the moneys thus derived from the sale of bulletins and duplicate tags may be fairly considered as moneys appropriated by the tenth section of the Act it is not necessary now to decide.

On behalf of the State Treasurer it is contended that the account for which the State Highway Commissioner has drawn his requisition should first be settled and approved by the Auditor General and then by the State Treasurer, under the Act of 1811 and that the Act of July 7, 1913, is unconstitutional. The Act of July 7, 1913, does not contemplate the previous approval of accounts by the Auditor General and State Treasurer. The Act establishing the State Highway Department, as we have already seen, gives to the State Highway Commissioner very large powers with respect to the purchase of the necessary material, labor and supplies for the construction, maintenance and repair of highways, and the legislature when it passed the Act of July 7, 1913, manifestly intended that payment of the moneys appropriated thereby for the use of the State Highway Department should be paid out on the requisition of the State Highway Commissioner without any previous settlement of accounts by the Auditor General or State Treasurer. It may be that these accounting officers have authority to audit the disbursements made by the State Highway Commissioner and satisfy themselves that they have been properly made, but this can be done after the requisition of

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the State Highway Commissioner has been honored and the money paid out in pursuance thereof, as the legislature apparently intended should be done. If the State Highway Commissioner should draw a requisition in his own favor for a sum of money to enable him to perform the duties of his office, the accounting officers could after he had received and disbursed the money, settled his account and charge him with any money which had not been properly disbursed and compel him and his bondsmen to make payment thereof.

Article III, section 16, of the Constitution provides:

"No moneys shall be paid out of the Treasury except upon appropriations made by law and on warrant drawn by the proper officers in pursuance thereof."

The Act of July 7, 1913, undoubtedly appropriated the registration and license fees to the State Highway Department, directing that they shall be deposited in the State Treasury for safe keeping and shall be paid out upon requisition from time to time of the State Highway Commissioner. This law was duly passed and approved, and it is in our opinion a valid appropriation of the moneys described for the designated use. The only constitutional requirement with respect to the paying out of money is that "no money shall be paid out of the Treasury except upon appropriations made by law." If this Act of 1913 had provided that the moneys derived from registrations and licenses, and appropriated to the State Highway Department, should be deposited in a bank designated by the Governor for safe keeping and should be paid out by said bank upon the requisition of the State Highway Commissioner it would undoubtedly have been valid legislation. Such bank could not have refused payment and the Auditor General and State Treasurer could not lawfully have prevented the bank from paying according to the requisition of the Commissioner. The fact that the Act directs the money appropriated to be deposited for safe keeping in the State Treasury certainly does not alter the legal status of the fund.

The Act of May 11, 1909, P. L. 519, provides that no money shall be paid out of the State Treasury except in accordance with the provisions of an Act of Assembly setting forth the amount expended and the purpose of the expenditure, and further prohibits the paying out of any money in excess of the amount specifically appropriated.

If there be any conflict between this statute and the Act of

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July 7, 1913, it is sufficient to say that the provisions of the later statute must control.

There can be no pretense that the payment asked for here is in excess of the amount specifically appropriated. To have undertaken to set out in the Act of July 7, 1913, the exact amount to be paid to every individual with whom the State Highway Commissioner made a contract with respect to the highways would have been impracticable, and therefore the legislature did not undertake so to do, but directed that the money should be paid out on the requisition of the State Highway Commissioner, who is the head of a separate department of the State government and acting under bond. The title to the Act of July 7, 1913, relates to the regulating of motor vehicles, fixes the rate of speed, imposes various duties upon those operating them, the penalties for violation of the regulations contained in the Act, and provides for the disposition of fees collected and fines imposed thereunder. It relates to a single subject which is expressed in the title with sufficient clearness.

In *Kelly vs. Mayberry Township*, 154 Pa. 440, it is held:

"A title need not embody all the distinct provisions of the bill in detail nor, as has been said, serve as an index or digest of its contents. It is sufficient if the title fairly gives notice of the real subject of the Act so as reasonably to lead to an inquiry of what is contained in the body of the bill."

Numerous other authorities to the same effect might be quoted.

After careful consideration we are satisfied that the Act of July 7, 1913, is valid legislation, that its tenth section specifically appropriates the moneys derived from registrations and licenses to the State Highway Department, and that these moneys have been paid into the State Treasury for safe keeping until required by the State Highway Commissioner for the use for which they were thus appropriated.

The Auditor General has failed to answer the petition of the Commonwealth. The bill attached to the requisition has been verified by the affidavit of the State Highway Commissioner. The State Treasurer having filed an answer which was traversed by the Attorney General, had the benefit of a trial by jury which has found the facts hereinbefore at length set forth. The bill attached to the requisition has been found by the jury to be correct and its accuracy has not been denied by the Auditor General. Under these circumstances we are of opin-

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ion that the Commonwealth is entitled to the allowance of the motions heretofore made by her Attorney General for a peremptory writ against the Auditor General and the State Treasurer, respectively. It is therefore now ordered, adjudged and decreed that a writ of peremptory mandamus be now issued commanding A. W. Powell, Auditor General, to draw his warrant upon the said R. K. Young, State Treasurer, for the sum of ten hundred and thirty-five dollars in favor of the National Lime Stone Company, as specified in the requisition of Edward M. Bigelow, State Highway Commissioner, dated February 16, 1914, and commanding the said R. K. Young, State Treasurer, upon presentation of the said warrant to draw his check for the sum of ten hundred and thirty-five dollars in favor of the National Lime Stone Company, and deliver said check to said National Lime Stone Company, as specified in the said requisition of Edward M. Bigelow, State Highway Commissioner, charging the said sum of ten hundred and thirty-five dollars against the fund received from registration and license fees under the Act of July 7, 1913.

C. S. GœRLICH AND J. J. SHONK vs. BETHLEHEM CITY WATER COMPANY.

Water companies—Rates—Discrimination.

A special discount of fifteen per cent. for prompt payment, allowed only to those customers of a water company who lived on streets on which the water company came into competition with the rates of a municipal water plant, is not such discrimination as the Act of 1913 was intended to prevent.

Public Service Commission. No. 123.

PENNYPACKER, Commissioner, June 2, 1914.

The complaint in the above case sets forth that "The Bethlehem City Water Company charges two different prices for the same service in the same borough," that it "charges more to certain citizens of Bethlehem Borough than to others through different rates of discount for prompt payment," and that "on streets of borough where Bethlehem Borough has water mains the water company allow forty per cent. discount and on other streets only allow twenty-five per cent."

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The respondent filed an answer in which it was alleged "That no discrimination or rebate or drawback or discount is allowed to any particular person or corporation, except as stated in the published rates of said water company." These published rates contained the following provision: "All above rates are subject to twenty-five per cent. discount if paid within thirty days from date of bill. * * * an additional discount of fifteen per cent. is allowed to consumers on the following streets in the borough of Bethlehem, West Side: Water Street, Hill Street, Prospect Avenue, between Conestoga Street and Third Avenue; on Second Avenue, between Prospect Avenue and Broad Street; on Third Avenue, between Prospect Avenue and Broad Street; on Union Street, between Monacacy Bridge and First Avenue."

From the testimony taken at the hearing the following facts are found: The Bethlehem City Water Company is a corporation which was chartered prior to 1884. It has a capital stock of \$500,000.00; it has a bonded indebtedness of \$667,000.00, and a plant which has cost over \$1,250,000.00. It has never declared any dividend on the stock, and its earnings have been expended in payment of the interest on the bonds and in extending the plant. Its water supply is obtained from the Lehigh River and from springs, is then filtered in its filtering plant and it furnishes an adequate supply of good soft water. Its net earnings are about \$30,000.00 per annum.

West Bethlehem was originally the village of Hanover, in Lehigh County. The respondent extended its water mains to this village and began to supply water to it February, 1886. The village was subsequently incorporated as the Borough of West Bethlehem, and was consolidated with Bethlehem in Northampton County, Aug. 16, 1904. The borough of Bethlehem has its own water plant. Its supply of water is obtained from artesian wells and this water in hardness, as compared with that of the respondents, is as 265 to 65. In 1913 the borough of Bethlehem extended its water mains to West Bethlehem, laying them upon the streets which have been above designated, and proposed to supply water at rates lower than those of the respondent. Thereupon the respondent as a matter of self protection and in order to meet the competition, made the additional discount of fifteen per cent. for prompt payment to consumers along the streets which have been described. There was no evidence to show that it was not con-

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tended that the rates established by respondent were excessive or unreasonable. It was, however, contended that the additional discount of fifteen per cent. for prompt payment allowed to consumers on one street and not to consumers on another, street only a square away, constituted a discrimination within the prohibition of paragraph "a," Section 8, of the Act of July 26, 1913. The persons benefited by this discount number one hundred. The total number of customers of the respondent company in West Bethlehem is nine hundred and fifty-seven.

The question raised under the facts so found is whether or not the additional discount allowed to certain consumers and not to all is such a discrimination as the Act of 1913 was intended to prevent. There is much of merit in the position of the respondent. It has invested large sums in its plant, and has for thirty years at least, supplied the people with a necessity of life without any return made to its stockholders. It now finds the territory it had occupied invaded and its rates presumed to be reasonable, in the absence of evidence to the contrary, assailed. It will be observed that the greater or lesser compensation forbidden by the Act of 1913 is that of a charge "for a like and contemporaneous service under substantially similar circumstances and conditions." While it is manifestly the purpose of the act that public service companies should be supervised and controlled, and that everything in their conduct unreasonable or unfair should be prevented, there is nothing to indicate any intention to destroy vested interests or to hamper the proper exercise of the powers conferred upon such companies.

In the case of *Hoover vs. Pennsylvania Railroad Company*, 156 Pa. 220, the Supreme Court of Pennsylvania in construing the Act of June 4, 1883, permitted a charge of a lower rate of freight upon coal transported to a manufacturing establishment from which the railroad received manufactured goods for transportation than to a coal dealer. The court said the act "prohibits only discrimination which is undue or unreasonable and the prohibited discrimination is further limited by the consideration that it must be for a like service from the same place upon like conditions and under similar circumstances. If, therefore, the discrimination in a given case is upon conditions which are not like and circumstances which are not similar the act is inapplicable." It has been held that in determining the question as to discrimination in railroad rates under the terms

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of the Interstate Commerce Act the fact of competition is material for consideration. In *Railroad Company vs. Behlmer*, 175 U. S. p. 671, it was said "all competition provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making was proper under the statute to be taken into consideration," and in 181 U. S. Reports, p. 18, it was said "the only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court, that is, that competition is real and substantial, and exercises a potential influence on rates to a particular point brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point and that greater rate to the non-competitive point may apparently engender a discrimination against it."

In the present case with respect to the streets to whose residents the greater discount was allowed by the respondent, there was competition of a serious character. To these residents another supply was offered at lower rates. The undisputed testimony is that it was necessary "to meet their rates or lose the business entirely." To lose the business would be to render valueless the investment in that part of the plant. The competition was the more threatening because of the fact that it had the strength and power of the municipality to support it. As to what constitutes such competition as will create a dissimilarity of circumstances and conditions must be determined from the facts of each case as it arises. After giving careful consideration to the ascertained facts and the situation as it exists in West Bethlehem, it is our conclusion that such dissimilarity between the conditions upon the streets named and the others exists as to make the prohibition of the statute inapplicable. It follows that the complaint should be dismissed and it will be so ordered.

ORDER.

This case being at issue, upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof,

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made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, June 2, 1914, it is ordered, that the complaint in this proceeding be, and it is, hereby dismissed.

COMMONWEALTH OF PENNSYLVANIA, EX RELATIONE, JOHN C. BELL, ATTORNEY GENERAL, *vs.* NEVA R. DEARDORFF.

Vital statistics—Births and deaths—Registration—Act of June 6, 1907.

Where a city has no ordinance providing for a system of registration of births and deaths, but the work is done by a city official, recognized by the city, and paid for by an appropriation ordinance, this is substantially the case of an official acting under an ordinance.

The system of registering births and deaths in Philadelphia was not abolished by the Act of June 6, 1907, P. L. 422.

The Chief of the Division of Vital Statistics in the Bureau of Health of the Department of Public Health and Charities, of Philadelphia, is entitled to act as local registrar of vital statistics, under the state system of registration, in the registration district of Philadelphia.

Quo warranto. C. P. Dauphin County, No. 6 Commonwealth Docket, 1914.

John C. Bell, Attorney General, for plaintiff.

T. Henry Walnut, Frank P. Prichard, James Gay Gordon, Jr., and Michael J. Ryan, for defendant.

KUNKEL, P. J., June 29, 1914.

In this proceeding the commonwealth calls on the defendant, Neva R. Deardorff, to show by what authority she acts as local registrar in the city of Philadelphia under the state system of registration of births and deaths. The case comes before us on the demurrer to the answer filed to the suggestion for the writ.

By the Act of May 1, 1905, P. L. 330, a system of registration of births and deaths throughout the commonwealth, by means of certificates of births and deaths and burial or removal permits, was established, and under the system the city of Philadelphia became a primary registration district in

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which the registration of births and deaths was required to be made. For the performance of this duty the act provided that the State Board of Health should appoint a local registrar of vital statistics for each registration district of the state, excepting for boroughs or cities as were otherwise provided for; and in the proviso to Section 4 of the act it was declared that in cities or boroughs where the local officials were at the date of the act performing this work under local ordinances, they should be continued as the local registrars in and for such cities or boroughs, but should be subject to all the provisions of the act.

The defendant is the Chief of the Division of Vital Statistics in the Bureau of Health of the Department of Public Health and Charities in the city of Philadelphia, which office was at the time of the passage of the Act of 1905 known as that of chief registration clerk, and the duty incident thereto and performed by the incumbent thereof was the registration of births and deaths in that city. By reason of the fact that she is the Chief of the Division of Vital Statistics and by virtue of the proviso in Section 4 of the Act of May 1, 1905, the defendant claims to be the local registrar of births and deaths, and rightfully to act as such, in the city of Philadelphia under the state system of registration.

The commonwealth contends that the registration of Philadelphia does not fall within the proviso in Section 4, because the registration clerk was not officiating in the registration of births and deaths under an ordinance of that city. It appears that there was no ordinance providing a system of registration, but the work of registering births and deaths was done by the chief registration clerk and the salary for that official was provided for by an annual appropriation by ordinance, and the work of registration has been paid for annually by ordinance ever since. We cannot agree with the position taken by the commonwealth. The fact is, the work of registration was performed by the local official and was paid for by ordinance. Although there was no ordinance prescribing a method or system for registering births and deaths, yet the work was actually done; and the fact that it was done and the manner of its doing was recognized by the city councils and provisions made for its payment. This we think was substantially the case of an official officiating under an ordinance, and brought the district of Philadelphia within proviso 4, making the registration

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clerk at the time of the passage of the act and the successors in that office the local registrars in that district. This was evidently the view taken of the proviso by the legislature of 1907, when it made provision for compensating the local officials acting as local registrars in cities of the first class. It is hardly necessary to observe that the city of Philadelphia is the only city in that class and necessarily the only city to which the provision could refer. Act of June 6, 1907, P. L. 422.

The commonwealth maintains further that the system of registering births and deaths in the city of Philadelphia was abolished by the amendatory Act of June 6, 1907, P. L. 422, and that therefore the official who was officiating in the registration of births and deaths ceased to be the local registrar there. We do not construe the Act of 1907 as having that effect. All systems for the registration of births and deaths in the several municipalities of the commonwealth other than the one provided by the Act of 1905 were abolished by Section 6 of the Act of 1907, but it did not follow that the local officials who were authorized to administer the state system were excluded from acting as local registrars under that system in their respective districts. The abolition of the system was one thing, the exclusion of the local officials from officiating as local registrars was another. Manifestly the object of the Act of 1907 was to make the system provided by the Act of 1905 the only system which was to be administered in the several districts of the state. By the system was meant the manner or method of registration and all the details incidental and necessary to perfect the collection, registration, and preservation of births and deaths specifically prescribed in those acts. There is nothing in Section 6 of the Act of 1907 to justify the conclusion that the local officials then acting as local registrars were to cease to act as such. If the term "system," as used in the act, is to be so construed as to include the agencies through which it was administered, then the local officials acting as local registrars were clearly retained, because the Act of 1905, in which the system is to be found, expressly provided that the registration of births and deaths should be made by the local officials. That it was not the legislative intention that the local officials should cease to act as local registrars appears from the fact that the fifth section of the Act of 1907, immediately preceding the repealing section, expressly provided for their compensation. Before the

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amendment of 1907 the local officials who acted as local registrars received no other compensation than that which was paid them as local officials. By the amendment of 1907 compensation at the rate of five cents for each birth and each death certificate was provided for them. Provision would hardly have been made for compensating the local officials for acting as local registrars under the state system if it was intended that they should be excluded from acting in that capacity. And again in the Act of June 13, 1911 (P. L. 900), the local official in a city of the first class, necessarily the city of Philadelphia, was recognized as the local registrar under the state system by the provision for an increase of the fees chargeable for work done as local registrar and for the payment thereof by the state treasurer.

For the consideration stated we are of the opinion that the defendant, Neva R. Deardorff, is entitled to act as local registrar of vital statistics under the state system of registration in the registration district composed of the city of Philadelphia. Accordingly judgment is directed to be entered on the demurrer against the commonwealth and in favor of the defendant.

COMMONWEALTH OF PENNSYLVANIA, EX REL. MAX ARON, vs.
ARCHIBALD W. POWELL, AUDITOR GENERAL.

Constitutional law—Appropriations.

An appropriation for the salary, mileage, stationery, and postage for the full term, to a member of the legislature who had been elected to fill the unexpired term of a deceased member, is not a violation of Article III, Section 18, of the Constitution, which provides that, "No appropriation, except for pensions or gratuities for military service, shall be made for charitable, educational, or benevolent purposes to any person or community, nor to any denominational sectarian institution, corporation or association."

Mandamus. C. P. Dauphin County, No. 181 Commonwealth Docket, 1913.

Fow & Fow, for plaintiff.

John C. Bell, Attorney General, and *J. E. B. Cunningham*, Deputy Attorney General, for defendant.

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KUNKEL, P. J., June 29, 1914.

This is a proceeding to compel the defendant, the auditor general, to draw his warrant on the state treasurer in favor of the relator, Max Aron, for his salary as a member of the legislature of 1913. The case has been submitted to us on the petition for the writ of mandamus and the return which has been filed thereto. The relator was elected a member of the House of Representatives of the General Assembly of Pennsylvania from the Thirteenth Representative District of the city of Philadelphia, on March 28, 1913, to fill the vacancy caused by the death of John H. Riebel, who died on February 27, 1913. He took the oath of office on March 31, 1913, and exercised the office until the close of the legislative session on June 27, 1913. By the General Appropriation Act passed at that session, approved July 16, 1913, in Section 43, there was specifically appropriated to him for the payment of his salary, mileage, stationery, and postage the sum of \$1,692. He made demand upon the defendant, the auditor general, for a warrant on the state treasurer for this sum, but the defendant refused to comply with the demand on the ground that the appropriation was in violation of Article III, Section 18, of the Constitution, which provides that "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes to any person or community, nor to any denominational or sectarian institution, corporation or association." The single question thus presented is, whether the appropriation is in violation of the constitutional prohibition. This provision of the Constitution was enacted for the general purpose of preventing appropriations from the state treasury for denominational or sectarian uses, and to any person or community for charitable, educational or benevolent purposes. We are not able to concur in the position taken by the defendant, that the appropriation made to the relator was in part a gift or a gratuity. By its very terms it was recognized by the legislature as an appropriation to him for salary, etc., as a member of the House of Representatives of the General Assembly. No part of the moneys appropriated was for a purpose which could properly be called charitable, educational, or benevolent. The appropriation of the salary for the whole session is not necessarily a gift of so much thereof as may be said to represent that part

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of the session which had elapsed before the relator came into office. There is no provision in the statute, which fixes the salary, requiring an apportionment of it to the time served by the member or to the services rendered by him, nor does his right to the salary depend upon his rendition of service, but upon his lawful incumbency of the office. *Philadelphia vs. Gibbon*, 60 Pa. 136; *Philadelphia vs. Rink*, 17 W. N. C. 136; *Wilkes-Barre vs. Meyers*, 117 Pa. 395; 23 Am. & Eng. Ency. of Law 398. The power to make the appropriation, in the absence of any constitutional inhibition is well settled. *Russ vs. Commonwealth*, 210 Pa. 544. We are not convinced that the section of the Constitution referred to was ever intended to cover a case like the present one.

It is suggested that the full salary was appropriated by the General Appropriation Act of 1911 to the relator's predecessor in office, part of which was paid to him, and the remainder of which was again appropriated to his legal representative by the legislature of 1913, and that if the appropriation in question be sustained two salaries will thus have been appropriated to two incumbents of the one office for services at the same session of the legislature. The power of the legislature to pay the salary to the predecessor for the whole session, when he had vacated his office by death, is not now before us. The only question before us is that of the validity of the action taken by the legislature appropriating to the relator the full salary for the legislative session. Whether he should be paid a proportionate part of the salary or the full salary, and thus receive as much as those members who bore the heat and burden of the whole session, was strictly a legislative question. If the legislature had the power to appropriate the salary, the wisdom or policy of the appropriation is not a matter for judicial review.

For these considerations we are of the opinion that the relator is entitled to a warrant for the amount appropriated, and that it is the duty of the auditor general to deliver the warrant to him. However, we will not direct a preemptory mandamus to issue, unless it is formally requested, as we are satisfied that the refusal of the defendant to issue the warrant was due solely to his desire to conduct his office in accordance with the law and the Constitution, and that, unless he intends to appeal, he will be guided by this decision without any further action by the court.

COMMONWEALTH OF PENNSYLVANIA, EX REL. JOHN C. BELL,
ATTORNEY GENERAL, vs. A. W. POWELL, AUDITOR GEN-
ERAL, AND ROBERT K. YOUNG, STATE TREASURER.

Mandamus—Appeal—Supersedeas.

On appeal by the auditor general and state treasurer from an order awarding a preemptory writ of mandamus for the payment of money out of the state treasury, the court will not make the appeal a supersedeas when, in the opinion of the court, great harm may come to the state and the public by granting the supersedeas and no harm either personally or officially can come to the defendants by refusing it.

Petition for order making appeal a supersedeas. C. P. Dauphin County, No. 14 Commonwealth Docket, 1914.

John C. Bell, Attorney General, and *Wm. M. Hargest*, Second Deputy Attorney General, for plaintiff.

M. Hampton Todd, *Thomas A. Crichton*, *C. P. Rogers*, *John B. Eichenhauer*, and *Watson and Freeman*, for defendants.

McCARRELL, J., July 8, 1914.

An appeal has been taken by the defendants from our order awarding writs of peremptory mandamus in the above case, and the defendants have presented to us their petition asking for an order making the appeal a supersedeas. The reason for this request is the belief of defendants that the Act of 1913 appropriating the money received from auto licenses to the highway department is unconstitutional and their desire to have this question settled by the court of last resort. The attorney general has filed an answer to defendants' petition for this order, alleging inter alia that the commonwealth has assumed the control and maintenance of about 8,000 miles of public highways; that many of these highways are in bad condition, unsafe for public use, and that a large amount of money is immediately and urgently needed to make necessary repairs in order to render the highways fit for the use of the public and prevent them from becoming so greatly dilapidated that very large sums of money will be needed to rebuild them, which large expenditures can be prevented by timely repair of existing defects. The answer also alleges that indictments have been found against the highway commissioner in several counties and are threatened in others for failure to properly

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repair the highways. This answer is sworn to by the highway commissioner, and its allegations on this subject have not been denied by the defendants.

The road commissioners of Lower Merion Township, Montgomery County, appeared by counsel at the hearing and asked leave to intervene by presenting a petition, setting forth the very same condition of the highways in said township, which petition we permitted to be filed as an additional answer to defendants' petition for the order now requested.

An imperative necessity apparently exists for immediate action on the part of the highway commissioner. The commonwealth is bound for the care and maintenance of the highways, and if her officers are delayed in obtaining the money supposed to have been appropriated for this purpose great loss is likely to result to the state and the public safety be endangered by the defective condition of the roads. If the appeal be made a supersedeas it would probably prevent any action by the highway commissioner based upon his belief that the necessary funds have been appropriated and secured by the Act of 1913. He could not make the needed repairs. If the order be refused, he may possibly be able to contract with responsible parties for the immediate repair of the highways, the parties so contracting being willing to await the judicial decision of the question raised by the appeal.

In our opinion harm may result to the state and to the public by granting defendants' request, and we are unable to see how any harm can come to the defendants either officially or personally by reason of its refusal. We therefore decline to make the order requested and dismiss the defendants' petition.

COMMONWEALTH OF PENNSYLVANIA, EX REL. JOHN C. BELL,
ATTORNEY GENERAL, vs. A. W. POWELL, AUDITOR GENERAL
OF THE COMMONWEALTH OF PENNSYLVANIA.

Mandamus—Motion to quash writ—Grounds.

Matters not appearing in the petition for a writ of mandamus and which may be set out in an answer and duly proven are not proper grounds for a motion to quash.

Motion to quash writ of mandamus. C. P. Dauphin County,
No. 42 Commonwealth Docket, 1914.

Commonwealth *vs.* A. W. Powell, Auditor General.

John C. Bell, Attorney General, and *Wm. M. Hargest*, Second Deputy Attorney General, for plaintiff.

John B. Eichenhauer and *Watson & Freeman*, for defendants.

McCARRELL, J., June 8, 1914.

This is a petition for mandamus by the commonwealth on the relation of her attorney general against the auditor general to secure a writ, requiring him to issue a warrant upon the requisition of the state highway commissioner to Palmer and Snyder for the sum of eleven hundred and seven dollars, being the amount stated in the petition to be due to them for work done by them for the state highway department.

The defendant upon the return of the alternative writ filed a motion to quash for the reasons which are set out in the motion to quash the alternative writ issued in 14 Commonwealth Docket, 1914. The motion to quash contains an additional reason, alleging that under the contract with Palmer and Snyder, copy of which is on file in the auditor general's office, no money was due them at the time the petition was filed, and that no money would be due until May 20, 1914. This last reason is not a proper ground for a motion to quash, as it refers to matters not appearing in the petition, but which may be properly set out in an answer and duly proven. We therefore overruled the motion to quash, and we now give as reason therefor the reasons set out in our opinion filed in No. 14 Commonwealth Docket, 1914, desiring our opinion in that case to be regarded as part of the record in this case as fully as if set out herein at length.

Shortly after the filing of the motion to quash we directed that the defendant file an answer on or before May 21, 1914. No answer was filed in response to the averments of the petition, but an affidavit was given to the prothonotary setting forth that by reason of the failure of the state to furnish the defendant with counsel or money to employ counsel he was unable to prepare his defense in this case. None of the allegations contained in the petition are denied and the attorney general has moved for judgment against the defendant. The question raised is precisely the same as that raised in the case of Commonwealth, *ex rel.* Attorney General Bell *vs.* the Auditor General and the State Treasurer in No. 14 Commonwealth

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Docket, 1914. For the reasons set out in our opinion filed in that case, which opinion is to be regarded as written herein, we are satisfied that the commonwealth is entitled to the writ prayed for, and therefore it is ordered, adjudged and decreed that a writ do now issue, commanding the defendant, A. W. Powell, Auditor General of the State of Pennsylvania, to issue his warrant upon the state treasurer in favor of Palmer and Snyder for the sum of eleven hundred and seven dollars in accordance with the requisition of the state highway commissioner, referred to in the petition in this case.

PUBLICATION OF PROPOSED AMENDMENTS TO THE CONSTITUTION.

Constitution—Amendments—Publication.

It is the duty of the secretary of the commonwealth to publish joint resolutions Nos. 2 and 6, proposing two separate and distinct amendments to Section 8 of Article IX, of the Constitution, in two newspapers in every county in which such newspapers shall be published, three months before the general election of 1914.

Attorney General's Department. Opinion to Robert McAfee, Secretary of the Commonwealth.

BELL, Attorney General, June 23, 1914.

This department is in receipt of your communication under date of June —, 1914, directing attention to the fact that, at the legislative session of 1913, two different joint resolutions, to wit, joint resolutions Nos. 2 and 6, proposing two separate and distinctive amendments to the same article and section of the Constitution, namely, Section 8 of Article IX, relating to debts of municipalities, as amended by the electors of this commonwealth in November, 1911, were agreed to by a majority of the members elected to each house, duly entered on their journals with the yeas and nays taken thereon and are now on file in your office.

You ask to be advised whether, in view of the apparently conflicting provisions of these proposed amendments and in view of the apprehended difficulty in determining what the organic laws of the commonwealth would be in case both of these proposed amendments should be passed at the legislative

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session of 1915 and adopted by the qualified electors of the state, it is your duty to publish both of the proposed amendments three months before the general election of 1914 in at least two newspapers in every county in which such newspapers shall be published.

One of the proposed amendments relates only to the city of Philadelphia, and the other to the city and county of Philadelphia.

The original Section 8 of Article IX of the present Constitution provided, in substance, that the debt of any county, city or other municipality should never exceed seven per centum upon the assessed value of the taxable property therein, and that no municipality should incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors at a public election, but that any city, the debt of which, at the time of adoption of said Constitution, exceeded seven per centum of such assessed valuation, might be authorized by law to increase the same three per centum in the aggregate at any one time upon such valuation.

By the amendment of 1911 to this section of the Constitution, it was provided, in substance, that any debt or debts, thereafter incurred by the city and county of Philadelphia for the construction and development of subways for transit purposes or for the construction of wharves and docks, or the reclamation of land to be used in the construction of a system of wharves and docks as public improvements to be owned by said city and county and which yield current net revenue in excess of the interest on such debt or debts and of the annual installments necessary for their cancellation, might be excluded in ascertaining the power of the city and county of Philadelphia to become otherwise indebted, provided a sinking fund for their cancellation should be established and maintained.

By said joint resolution No. 6, it is now proposed to further amend Section 8 of Article IX, as thus amended in 1911, by striking out of the specifications of the debts which may be excluded, under such circumstances, in ascertaining the power of the city and county of Philadelphia to become otherwise indebted, debts incurred for the construction and development "of subway for transit purposes" and by inserting a proviso to the effect that such indebtedness shall not at any time exceed, in the aggregate, the sum of twenty-five mil-

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lion dollars for certain specified purposes and by also inserting a proviso that the city and county of Philadelphia shall, at or before the time of incurring certain indebtedness, provide for the collection of an annual tax sufficient to pay the interest thereon and also the principal thereof within fifty years from the incurring thereof.

By said joint resolution No. 2, it is likewise proposed to further amend Section 8 of Article IX, as amended in 1911, inter alia, by providing that the city of Philadelphia, upon certain conditions therein set forth, may increase its indebtedness to the extent of three per centum in excess of seven per centum upon the assessed value of the taxable property therein for certain specific purposes, namely, the construction and improvement of subways, tunnels, railways, elevated railways and other transit facilities, the construction and improvement of wharves and docks and the reclamation of land to be used in the construction of wharves and docks owned or to be owned by said city. It is provided that such increase shall only be made, however, with the assent of the electors at a public election. This proposed amendment contains elaborate provisions with relation to the deduction of certain credits in ascertaining the borrowing capacity of said city and also contains provisions relating to the issuing of obligations maturing not later than fifty years from date and with relation to the establishment of sinking funds, etc.

No attempt has been made herein to analyze the proposed amendments with any degree of care or to construe their provisions because such action is unnecessary in disposing of your inquiry, but it seems obvious that if both of these amendments should finally be adopted by the people at the same time it would be somewhat difficult to determine just what the people intended to provide in their Constitution with reference to the power of the city and county of Philadelphia to become indebted.

The apprehended confusion and difficulty, however, is a matter for the consideration, in the first place, of the members of the house and senate at the legislative session of 1915, when the proposed amendments will again be before the general assembly for action by that body, and, finally, of the qualified electors of the state in the event that the amendments receive the approval of a majority of the house and senate at the ensuing session.

Publication of Proposed Amendments to the Constitution.

Your duty in the premises is clear. By Article XVIII of the Constitution, relating to future amendments of that instrument, it is provided that

"Any amendment or amendments to this Constitution may be proposed in the senate or house of representatives; if the same shall be agreed by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, *and the secretary of the commonwealth shall cause the same to be published three months before the next general election* in at least two newspapers in every county in which such newspapers shall be published," etc.

The article further provides for submission of the proposed amendment or amendments to the general assembly next afterwards chosen and, if agreed to by a majority of the members elected to each house, then for a second publication by you and, finally for their submission to the qualified electors of the state at such time as least three months after being so agreed to by the two houses as the general assembly shall prescribe.

In discussing the duties of the secretary of the commonwealth with relation to amendments proposed to the Constitution our Supreme Court, in the case of *Commonwealth vs. Griest*, 196 Pa. 396, said, at page 405:

"It will be observed that the duty of the secretary of the commonwealth follows immediately upon the entry of the amendment on the journals of the two houses with the yea and nay votes of the members. There is no other action by any department of the state government that is either required or allowed, prior to the action of the secretary. And that action of the secretary is prescribed in mandatory language, thus, 'And the secretary of the commonwealth shall cause the same to be published,' etc. He has no discretion in the premises. His action does not depend upon any other action whatever. It is his own, personal, individual and official duty, imperative in its character, and of the very highest and gravest obligation because it is imposed by the Constitution itself, and he can only discharge that duty by literally performing its terms. He cannot excuse himself for non-performance by setting up advice, opinion or action of any other person, organization or department, official or otherwise, for the simple reason that the article of the Constitution which prescribes his duty does not allow it. There is no opportunity for any, even the least, inter-

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vention, between the entry of the amendment on the journals and the publication in the newspapers in the whole course of the proceeding for the creation of the amendment."

You are accordingly advised that it is your duty to publish, in accordance with the provisions of Article XVIII of the Constitution, the amendment proposed by joint resolution. No. 2 of the sessions of 1913 and also the amendment proposed by point resolution No. 6 of the same session.

*COMMONWEALTH vs. MARTIN FLEMING.**Murder—Evidence—New trial.*

This discovery of two witnesses who testify that a witness who testified as an expert on the part of the commonwealth on the trial of an indictment charging murder had made statements somewhat at variance with his opinion expressed at the trial is not after discovered evidence in the proper sense of the term.

After discovered testimony, as ground for a new trial, must go to the merits of the case and must not be merely for the purpose of impeaching the credibility of witnesses.

The new testimony must be such as will probably produce a different verdict, if a new trial should be awarded.

On the trial of an indictment charging murder, a point requesting the court to say, in effect, that although the jury might not be satisfied by a preponderance of evidence that the defendant was insane but was suffering from a derangement of the mind or disease of understanding so as to render him more than ordinarily susceptible to violent passion he would be guilty of second degree murder only, is properly refused.

That the court did not specially call the attention of the jury to certain testimony favorable to the defendant is not ground for a trial. when the court directed the jury to consider all of the testimony and the testimony to which the court did not specially call the attention of the jury was embodied in a written confession which went out with the jury and to which their attention was called.

Testimony that, about a week before the commission of the crime charged in the indictment, the defendant in speaking of the family of his victim, had said that he thought he would go up and kill them, is relevant and material.

Where testimony as to the conduct of defendant is excluded because the witnesses state that they are unable to form an opinion as to his

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sanity or insanity, but is afterwards heard at length and made the basis of expert opinions, the defendant is not prejudiced.

When, on the trial of an indictment for murder, there has been testimony that the defendant was living separate from his wife and contributing to her support under an order of court, the record showing the order is properly admitted.

Motion for new trial. Oyer and Terminer. Dauphin County, No. 131 June Sessions, 1913.

M. E. Stroup, District Attorney, for commonwealth.

W. L. Loeser and *Geo. L. Reed*, for defendant.

McCARRELL, J., July 13, 1914.

The first reason urged by the learned counsel for the defendant relates to certain statements alleged to have been made after the trial by Dr. Blair, a witness for the commonwealth, contradictory of his testimony at the trial. According to the testimony of Paul G. Smith, Esq., and Mr. E. Bruce Taylor, Dr. Blair stated after the trial had been concluded that "Fleming might have had a much better show if the defense had been monomania. A monomaniac is a person who is insane on one subject, like Fleming, who is insane on the subject of his child. The defendant, Fleming, was probably sane on every other subject but this, and that he brooded about it until he became a monomaniac about his child. I was subpoenaed by the commonwealth and only answered the questions asked me, that is why I did not volunteer any opinion as to monomania." Dr. Blair in his deposition denies that he used the language imputed to him by Messrs. Smith and Taylor. He says "I made the statement to Mr. Smith that the defense would have had a better show if their expert witness instead of showing that Fleming was possessed with the impulse of the explosion of the emotion if he had used monomania, melancholia, or dementia as a defense the defense would have had a much better show. I was asked why I did not bring that up, and I answered that I had answered the questions that were asked me on the stand. The point was then raised by Mr. Smith as to monomania, and I did not say that I thought Fleming was a monomaniac, but that his actions might have raised the question that he was a monomaniac, because he brooded over the condition of his child. I spoke of a monomaniac in cases in general and not

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this specific case. I did not mean that Fleming was a monomaniac, but said that the defense could have put up that defense and would have had a better show. I think it was purely a matter of misunderstanding. It was a friendly conversation on the street where there was a great deal of traffic and on account of the noise I may have misunderstood some of the questions as well as the other gentlemen. Following this conversation Mr. Loeser called at my office and we had a friendly talk, but I thought that Mr. Loeser understood that I had not changed my mind, and was surprised to find that the statement had been published in the newspaper. I can positively say that I did not change my mind and am of the same opinion now as on the witness stand."

That there was a misunderstanding by Mr. Smith and Mr. Taylor as to what Dr. Blair actually stated to them after the trial had been concluded is manifest. That there was a misunderstanding is not surprising when we consider the place and circumstances attending the conversation. It is clear from Dr. Blair's testimony that he is now of the same opinion as he expressed at the trial, and would doubtless again express the same opinion if again called to testify. The case did not turn on the testimony of Dr. Blair. The jury was not bound to accept his opinion, as we stated at the trial, nor were they bound to accept the opinion of Dr. Bill, the expert testifying for the defendant. This is not after discovered evidence in the proper sense of that term. It is only the discovery of two witnesses, who testify that since the trial Dr. Blair made statements with respect to his own opinion somewhat at variance with the opinion expressed at the trial. Even if we should treat this as after discovered evidence the principles governing the granting of new trials because thereof are well settled. They are clearly stated by Judge King in the case of *Commonwealth vs. Williams*, 2 *Ashmead* 76, and we quote therefrom as follows:

(a) The testimony must go to the merits of the case and must not be merely for the purpose of impeaching the credibility of witnesses.

(b) The new testimony must be such as will probably produce a different verdict if a new trial should be awarded.

The only possible purpose of that which is called after discovered evidence here is to impeach the credibility of a witness. It does not go to the merits of the case and does not fall within

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the first rule above indicated. It certainly is not covered by the second rule, as we can see no probability that it would produce a different verdict. As already stated, the witnesses to whom Dr. Blair talked have manifestly misunderstood his statements. It seems to us clear that Dr. Blair only criticized the theory of defendant's expert and suggested to the witnesses what in his opinion would have been a much better theory than the one that the defendant was moved by the impulse of the explosion of an emotion. The testimony of Dr. Blair, according to his deposition, would upon the second trial be the same as at the first. Following the well recognized rules just referred to we are unable to see any reason why the defendant should be granted a new trial because of any statements made by Dr. Blair subsequent to the trial.

It is contended that we erred in refusing to affirm the ninth point submitted by the defendant at the trial. This point asked us to say in effect that although the jury might not be satisfied by a preponderance of the evidence that the defendant was insane but was suffering from a derangement of mind or disease of understanding so as to render him more than ordinarily susceptible of violent passion, he would be guilty of second degree murder only. In refusing this point we acted in accordance with numerous decisions of our own Supreme Court. Insanity must be a complete defense or none. *Commonwealth vs. Wireback*, 190 Pa. 139; *Commonwealth vs. Barner*, 199 Pa. 355. Numerous other cases to the same effect might be cited.

It is next suggested that we erred in stating to the jury that in the opinion of Dr. Bill the defendant was sane and acting with a conscious knowledge of what he was doing until just before he fired the fatal shots. This statement is in exact accordance with the testimony of Dr. Bill, as will appear from his examination on pages 212-217. The extract from the charge, which is quoted in the reason for a new trial is only a few lines from our general instructions to the jury, in which we invited the jury to consider all his acts on the afternoon of the day when this offense was committed and to consider the acts preceding, immediately connected with, and following the firing of the fatal shots. We called attention to these acts and also to the defendant's written confession, which told the jury in defendant's own language what he had done during the evening. We find no reason for a new trial on this ground.

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In the fifth reason for a new trial complaint is made that while we reviewed the testimony, we omitted entirely one of the most important points in the defendant's behalf, namely, the statement in defendant's confession that he sat by his wife's side and held her hand and kissed her. We called particular attention to the defendant's confession and informed the jury that they would have it with them and should give it careful consideration. No complaint was made at the trial of our failure to call specific attention to the fact stated by defendant in his confession that he held his wife's hand and kissed her, and we are unable to discover anything in this reason which would warrant our granting a new trial.

The sixth reason complains that we permitted Mr. Calhoun to testify as to a conversation he had with the defendant a week or two before the murder, in which he said he would blow up one of the Bryan family. The testimony of Calhoun was more definite than the commonwealth's offer, as he stated that in speaking of the Bryan family he said he thought that he would go up and kill them. We are satisfied that this testimony was material and relevant and that it was properly admitted.

In the seventh reason for a new trial complaint is made that Dr. Swartz was not permitted to testify as to what he had observed in the conduct and condition of the defendant. This objection is based upon what occurred when Dr. Swartz was first called as a witness for the defendant. In his examination at the bar of the court, in pursuance of objection made by the commonwealth to his testimony, the doctor stated that from all he had observed from defendant's conduct and speech he was not prepared to express an opinion to the effect that the defendant was insane. Upon this statement of the witness we regarded the offer then made as irrelevant, and did not hear what Dr. Swartz was able to state in regard to defendant's conduct and speech. Later, however, the doctor was called and examined at great length in regard to his observations of the defendant and his statements were heard by the jury and were used by the experts on both sides to enable them to frame their opinions as to defendant's sanity or insanity.

In the eighth reason for a new trial complaint is made as to our refusal to permit Henry Hähnlen, Joseph Cashner, Father Johnson and others to testify as to defendant's conduct. At the time we declined to hear this testimony the wit-

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nesses had severally stated in their examination at bar that they were unable to form any opinion as to the sanity or insanity of the defendant. Their testimony was therefore excluded as no offer was then made to permit their observation of the defendant to be considered as a basis for expert opinion. Later, however, all these witnesses were called and examined at length, testifying fully as to all the peculiarities of the defendant's conduct during the time when he was known to the witnesses. Very much of this testimony as to defendant's conduct and speech manifestly did not indicate insanity but it was heard, the defendant had the benefit of their statements with the jury, and the experts used the testimony as foundation for their respective opinions. We are unable to see that the defendant was in any way prejudiced by this procedure.

The ninth reason for a new trial relates to the admission in evidence of the record of the Court of Quarter Sessions to No. 177 March Sessions, 1913, in which the court directed the defendant to pay for the maintenance of his wife and child the sum of \$5.00 per week. Testimony had already been given, showing that the defendant was living separate and apart from his wife and was contributing to her support under an order of court. The relevancy of this offer was that it fixed the date when the complaint was made and when the order of court was entered. The defendant's wife made the information which brought the case into court. She was the prosecutrix. We are unable to see how the admission of this record in any way prejudiced the defendant or violated any rule of evidence. Its admission seems to have been fully warranted by what was done in the case of *Commonwealth vs. Johnson*, 162 Pa. 63. In that case the defendant was tried for the murder of his child and testimony was admitted at the trial as to a complaint made by his wife against him for desertion and non-support of herself and child. This admission was made the subject of an assignment of error in the Supreme Court, but after careful review of the entire case the judgment was affirmed and the appeal dismissed.

We have carefully considered all the reasons for a new trial which have been presented in this case. We have considered the earnest and able argument of counsel and the very carefully prepared brief submitted. The case was ably tried originally and all was done by the learned counsel representing the

Mothers' Pensions.

defendant which could properly be done to secure a verdict in defendant's favor. The reasons for a new trial also have been urged with zeal and ability, and we have given them, as already stated, our careful consideration. The case against the defendant seems to us to have been made out beyond any reasonable doubt. He admitted in his written confession the killing of Mrs. Bryan, and the testimony produced in his behalf at the trial was insufficient to satisfy the jury by its fair preponderance that the defendant was insane at the time the act was committed. In the light of the testimony upon the subject of defendant's insanity the jury was, in our opinion, fully justified in reaching the conclusion that the alleged insanity had not been proven. All the acts and conduct of the defendant at and about the time of the firing of the fatal shots clearly indicated that he was acting with a conscious knowledge of what he was doing and that he was under the law responsible for his acts. We are fully satisfied that no injustice has been done the defendant by the verdict of the jury.

We therefore now overrule the motion for a new trial and permit the district attorney to move for the entry of judgment upon the record.

MOTHERS' PENSIONS.*Mothers' pensions—Appropriation—Act of April 29, 1913.*

The evident purpose of the Mothers' Pensions Act of April 29, 1913, was to make provision for the payment of pensions during the two years succeeding the approval of the act. If the next legislature should fail to make an appropriation to continue the purposes of the act, the funds carried by it will be available until exhausted. No part of the appropriation will lapse into the general fund in the state treasury, except upon the making of a new appropriation.

No county board of trustees can grant pensions, under the Mothers' Pensions Act, in an amount exceeding the amount available for that county for each year.

Attorney General's Department. Opinion to A. W. Powell, Auditor General.

CUNNINGHAM, Deputy Attorney General, July 15, 1914.

I am in receipt of your letter of June 17th enclosing a copy of a letter received by your department from the trustees of

Mothers' Pensions.

Mothers' Pensions in and for Allegheny County, and requesting a construction by this department of that portion of Section 2 of the Mothers' Pension Act of April 29, 1913, P. L. 118, which makes an appropriation for the purpose of carrying the provisions of the act into effect.

Using the county of Allegheny as a concrete illustration for the purpose of discussing and disposing of your inquiry, I understand the material facts to be as follows:

Out of the sum of \$200,000 appropriated by said act for the payment of the state's one-half share of pensions granted to indigent, widowed, or abandoned mothers (which amount is directed therein to be proportioned to the counties of the commonwealth according to their population as shown by the census of 1910), the amount proportioned to Allegheny County and placed, in accordance with the directions of the act, upon the books of the state treasury to the credit of the Trustees of Allegheny County, was \$26,573.96, one-half of which amount, viz, \$13,286.98, was to be "available" the first year after approval, or from June 1, 1913, to June 1, 1914, and the remainder, viz, \$13,286.98, the second year, to wit, from June 1, 1914, to June 1, 1915, or "until another appropriation may become available."

Allegheny County having complied with the provisions of the act by providing through its county government an equal amount for the payment of mothers' pensions, trustees were duly appointed therein and certain pensions have been recommended and are now being paid in said county. The total amount expended out of the state funds during the year beginning June 1, 1913, and ending June 1, 1914, in the payment of mothers' pensions in said county, was \$1,877.50, and the mothers' pension roll for June, 1914, amounted to \$442.50, which would make a total expenditure of at least \$5,310.00 for the current year, even if no additional pensions were recommended and granted.

You now ask to be advised whether the unexpended balance of Allegheny's proportionate share of state money for mothers' pensions for the appropriation year from June 1, 1913, to June 1, 1914, to wit, \$11,409.48, has lapsed into the state treasury, or whether it is still available to the trustees in Allegheny County, and if so, when and under what conditions. The language of that portion of the act under consideration which relates to the appropriation, is not clear and the legislative in-

Mothers' Pensions.

tent is consequently difficult of interpretation. The act reads as follows:

"In order to carry the provisions of this act into effect, an appropriation of \$200,000 from moneys not otherwise appropriated, is hereby made; proportioned to the counties of the commonwealth according to their respective population in the census of one thousand nine hundred and ten, by the auditor general and state treasurer; upon the passage and approval of this bill the state treasurer shall place the proportionate amount of the entire appropriation to the various counties upon the books of the state treasury to the credit of the trustees; one-half of which amount shall be available the first year after approval, and the remainder the second year, or until another appropriation may become available."

The legislative intent, as expressed in the language above quoted, seems to be, first,—that in no county shall trustees be permitted to grant pensions which, in so far as the state's liability is concerned, will exceed, in the aggregate, during either the first or second years referred to in the act, more than one-half of the total amount apportioned to and available for such county; and secondly,—that the total amount carried by the bill is to be available until another appropriation becomes available, or in case no further appropriation should be made, then until it has been exhausted. The evident purpose of the bill is to make provision of the payment of pensions during the two appropriation years succeeding the approval of the bill, with the expectation that subsequent legislatures will make such additional appropriations as may be necessary to continue the system. If, however, the legislature at its next session, for instance, should fail to make an appropriation, it seems to be the intent of this bill that the funds carried by it shall be available until exhausted. For this reason I am of opinion that it was not contemplated that any part of the funds appropriated by the Act of 1913 and directed to be set apart to the credit of the trustees of the various counties should lapse into the general fund in the state treasury except upon the making of a new appropriation by a subsequent legislature. It is equally clear that no county board of trustees can grant pensions exceeding, in the aggregate, the amount available to that county each year. For instance, the Allegheny County trustees could not have granted pensions payable by the commonwealth during the year June, 1913-1914, exceeding, in the

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aggregate, \$13,286.98, nor during the year June, 1914-1915, can they, as against the commonwealth, grant new or continue old pensions, exceeding, in the aggregate, \$13,286.98.

A new system of pensions is inaugurated by the Act of 1913 with the evident hope upon the part of its advocates, that subsequent legislatures would continue the system by making the necessary appropriations. In the event, however, that no subsequent appropriation should be made it was intended that the appropriation carried by the Act of 1913 should be available: i. e., capable of being used or employed by the trustees, until exhausted.

I am, therefore, of opinion that the liability of the commonwealth for the payment of old and new mothers' pensions in Allegheny County cannot exceed, in the aggregate, \$13,286.98 for the year beginning June 1, 1914, and ending June 1, 1915, and that any surplus remaining out of the respective amounts apportioned to Allegheny County for the years June, 1913-1914, and June, 1914-1915, will be available for the payment of the state's share of mothers' pensions, if no new appropriation for this purpose is made at the session of 1915, until the said surplus has been exhausted. In the event, however, that an appropriation is made by the session of 1915 for the payment of the state's share of mothers' pensions, then said surplus will revert to the general fund in the state treasury upon the date at which such new appropriation becomes available, and such surplus will doubtless be taken into consideration in the making of a new appropriation.

REGULATIONS GOVERNING THE GRANTING OF POWER OF ATTORNEY AND THE ISSUING OF CONCURRENCE IN TARIFFS OF RATES AND FARES OF COMMON CARRIERS AND EXPRESS COMPANIES.

In the matter of issuing power of attorney and concurrences in joint tariffs of common carriers and express companies.

Public Service Commission. Tariff Circular No. 1.

By THE COMMISSION, June 2d, 1914.

The Public Service Company Law, approved July 26, 1913, Article II, Section 1 (e), provides that tariffs or schedules of joint rates or fares need only be filed with the Commission

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by one of the companies—or its agents—and the other company or companies, with the consent and the approval of the Commission, need only file such evidence of concurrence therein or acceptance thereof as may be required by the Commission.

The following rules and regulations will govern the issuing of such concurrence, and power of attorney:

Rule 1. The forms below prescribed must be on paper 8 by 10½ inches. The original and one copy must be filed with the Commission and a copy furnished to the carrier or agent in whose favor the instrument is issued.

Rule 2. Such forms may either be printed or neatly type-written.

Rule 3. The follow serial designations must invariably be used:

For power of attorney:

Pa. E 1 No. (for express tariffs.)

or

Pa. F 1 No. (for freight tariffs.)

or

Pa. P 1 No. (for passenger tariffs.)

For concurrences:

Pa. E 2 No. (for express tariffs.)

or

Pa. F 2 No. (for freight tariffs.)

or

Pa. P 2 No. (for passenger tariffs.)

Rule 4. The granting of authority to issue tariffs, under power of attorney or concurrence, does not relieve the carrier or express company, conferring the authority, from the necessity of complying with the Public Service Company Law with respect to posting tariffs.

Tariffs issued under such authority must be posted by the carrier or express company conferring such authority.

Rule 5. A concurrence may be revoked by filing with the Commission notice of revocation, in duplicate, and serving copy thereof upon the carrier or express company, to whom such concurrence was given, at least sixty (60) days in advance of the effective date shown on notice of revocation.

Corresponding revision of tariff or tariffs shall be made in the next supplement to or reissue thereof, and if necessary, supplement or reissue shall be made for the sole purpose of

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making such change lawfully effective on statutory notice upon the effective date stated in the notice of revocation.

SPECIAL CONCURRENCE.

Rule 6. The following form must be used only in concurrence in rates or fares contained in tariffs filed with the Commission on or before July 1, 1914. Separate concurrence must be given for freight and passenger tariffs, and must apply to all the rates or fares contained in the tariffs of the carrier or express company to whom the concurrence is given (all tariffs intended to be covered being included in the concurrence as hereinafter required) and must not be modified except that the concurrence in freight tariffs may exclude coal and coke rates, for which separate concurrence may be given.

This form must be designated as "Special Concurrence" and must bear serial designation as provided in Rule 3 for concurrences.

Tariffs concurred in by means of this "Special Concurrence" need not be supplemented for the purpose of referring to the "Special Concurrence"

This form is designed to apply to all supplements including such as are issued after July 1st, 1914, but to make it thus operate, carrier or express company must file with the "Special Concurrence" a list of the tariffs, arranged numerically, intended to be covered thereby, placing on the list only the tariffs of the carrier or express company to whom the concurrence is given.

.....
(Name of issuing carrier.)

....., 191

Special Concurrence:

Pa E 2 No. (for express tariffs.)

or

Pa. F 2 No. (for freight tariffs.)

or

Pa. P 2 No. (for passenger tariffs.)

To the Public Service Commission of the Commonwealth of Pennsylvania, Harrisburg, Pa.:

This is to certify, That assents
(Insert name of carrier or express company.)

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to and concurs in the tariffs
 and rate schedules and supplements thereto stated on the sheets
 attached hereto and made part hereof which the
 or its agent has, prior
 (Insert name of carrier or express company.)

to July 1, 1914, filed with the Public Service Commission of
 the Commonwealth of Pennsylvania and which have not been
 cancelled and in which this company is shown as a participat-
 ing carrier, and hereby makes itself a party to and bound
 thereby in so far as such schedule contains rates applying upon
 via its line and to
 (Here insert character of traffic.)

but not from points thereon; and this authority will continue
 as to any supplement to such schedule issued on and after
 July 1, 1914, but not to the re-issues of such schedules.

.....
 (Insert name of carrier or express company.)

.....
 (Name of officer.)

.....
 (Title of officer.)

POWER OF ATTORNEY FOR PUBLICATION OF TARIFFS.

Rule 7. The following form will be used as power of at-
 torney by the issuing carrier or express company in giving
 authority to *an individual* but not to another carrier or ex-
 press company to *file for the issuing carrier tariffs or schedules*
as described.

Such authority must not be given to an association or bureau,
 and it shall not contain authority to delegate to another the
 power to be conferred.

If two or more carriers or express companies execute this
 form containing the words "for if jointly with other carrier"
 in favor of a joint agent it will not be necessary for those car-
 riers to exchange concurrences *with each other* as to the joint
 tariffs issued by that joint agent under such authority.

The same serial designation will be used as is provided in
 Rule 3.

.....
 (Name of carrier or express company in full.)

Date, 191..

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Pa. E 1 No. (for express tariffs.)

or

Pa. F 1 No. (for freight tariffs.)

or

Pa. P 1 No. (for passenger tariffs.)

KNOW ALL MEN BY THESE PRESENTS: That the (name of carrier or express company) has made, constituted and appointed, and by these presents does make, constitute, and appoint (name of person appointed) its true and lawful attorney and agent for the said company and in its name, place, and stead (for it alone) and for it jointly with other carriers), *to file tariffs, classifications and exception sheets and supplements thereto*, as required of common carriers by the Public Service Company Law and by regulations established by the Public Service Commission of the Commonwealth of Pennsylvania thereunder for the period of time, the traffic and the territory now herein named:

.....

And the said (name of carrier or express company) does hereby give and grant unto its said attorney and agent full power and authority to do and perform all and every act and thing above specified as fully to all intents and purposes as if the same were done and performed by the said company, hereby ratifying and confirming all that its said agent and attorney may lawfully do by virtue hereof, and assuming full responsibility for the acts and neglects of its said attorney and agent hereunder.

IN WITNESS WHEREOF the said company has caused these presents to be signed in its name by its president and to be duly attested under its corporate seal by its secretary, at in the State of, on this day of, in the year of our Lord nineteen hundred and

The (Name of carrier)

By

Attest: Its President.

.....,
 Secretary.

(Corporate seal.)

Tariffs of Common Carriers and Express Companies.

POWER OF ATTORNEY FOR CONCURRENCES.

Rule 8. The following form will be used as power of attorney to be given by common carriers or express companies to another common carrier or express company to *give and accept concurrences*.

Common carriers or express companies may confer upon other carriers or express companies the authority to give and accept *concurrences for their account* by the use of of the following form:

.....
(Name of carrier or express company in full.)

Date, 191..

Pa. E I No. (for express tariffs.)

or

Pa. F I No. (for freight tariffs.)

or

Pa. P I No. (for passenger tariffs.)

KNOW ALL MEN BY THESE PRESENTS: That the (name of carrier or express company) has made, constituted and appointed and by these presents does make, constitute, and appoint (name of carrier or express company) its true and lawful attorney and agent for the said company and in its name, place and stead to give *and accept concurrences* in tariffs or schedules as required of common carriers (or express companies) by the Public Service Company Law and by regulations established by the Public Service Commission of the Commonwealth of Pennsylvania thereunder for the period of time, the traffic and the territory now herein named:

.....
.....
.....

And the said (name of carrier or express company) does hereby give and grant unto its said attorney and agent full power and authority to do and perform all and every act and thing above specified as fully to all intents and purposes as if the same were done and performed by the said company, hereby ratifying and confirming all that its said agent and attorney may lawfully do by virtue hereof, and assuming full responsibility for the acts and neglects of its said attorney and agent hereunder.

Tariffs of Common Carriers and Express Companies.

IN WITNESS WHEREOF the said company has caused these presents to be signed in its name by its president and to be duly attested under its corporate seal by its secretary, at, in the State of, on this day of, in the year of our Lord nineteen hundred and

The (name of carrier)

By

Attest:

Its President.

.....

Secretary.

(Corporate seal.)

CONTINUING CONCURRENCE.

Rule 9. The following form will be used in concurring in rate or fare schedules published by common carriers, express companies or their duly appointed agents published and filed with the Commission on and subsequent to July 1, 1914:

.....
(Name of carrier or express company in full.)

Date, 191

Pa. E 2 No. (for express tariffs.)

or

Pa. F 2 No. (for freight tariffs.)

or

Pa. P 2 No. (for passenger tariffs.)

To the Public Service Commission of the Commonwealth of Pennsylvania, Harrisburg, Pa.:

THIS IS TO CERTIFY that (name of carrier or express company) assents to and concurs in the publication and filing of any (express, freight or passenger) rate (or fare) schedule or supplements thereto which the (name of carrier or express company) or its agent may make and file, and in which this company is shown as a participating carrier (or express company) and hereby makes itself a party to and bound thereby in so far as such schedule or supplements thereto contain rates (or fares) as described below:

.....
.....
.....

Elias Sassaman vs. Lehigh Valley Transit Co.

until this authority is revoked by formal and official notice of revocation placed in the hands of the Public Service Commission of the Commonwealth of Pennsylvania and of the carrier (or express company) to which this concurrence is given.

.....
(Name of carrier or express company.)

By
(Name of officer.)

.....
(Title of officer.)

ELIAS SASSAMAN vs. LEHIGH VALLEY TRANSIT COMPANY.

Transportation companies—Discrimination—Rates.

Existing local conditions are always a factor which must be considered in arranging a correct schedule of rates on the different lines of a transportation company.

The size of the cars, the frequency of the service rendered, the density of the population in the adjacent territory, the grades and general alignment of the road bed, the annual outlay for repairs and upkeep on different lines, all figure in the rate problem and must be considered in their proportionate bearing on the question.

Public Service Commission, No. 130.

BRECHT. Commissioner, April 21, 1914.

In the matter of the complaint of Elias Sassaman v. The Lehigh Valley Transit Company, the complainant petitions for a lower rate of fare from Coopersburg to Allentown than the rate now in effect, alleging that the fare collected at present is discriminatory as compared with the rates charged from other points, similarly situated on the lines of the respondent.

Coopersburg is a small town located nine miles from Allentown on the trolley line that extends from the latter place to Philadelphia. This branch of railway is an interurban line and forms a part of a more or less extensive trolley system radiating from Allentown as a general center, and operated by the Lehigh Valley Transit Company.

The regular rate of fare from Coopersburg to the city of Allentown is fifteen cents, but a return ticket can be purchased

Elias Sassaman vs. Lehigh Valley Transit Co.

at the office of the company at Coopersburg or Allentown for twenty-five cents, thus making the fare each way twelve and a half cents, or a trifle less than one and four-tenths cents per mile.

These return tickets have no time limit specified on them and must not be used on the day when purchased, but will be accepted for transportation upon any day of the year without any restriction as to the time, whatsoever. The purchaser, therefore, has the privilege, if he chooses to take advantage of it, of buying one or any number of these tickets at any given time, and is not obliged to call daily at the ticket office to pay his fare for transportation. Moreover, the ticket may be bought by one party and used by another, the ticket being accepted by the carrier from anyone that presents it.

The regular one-way fare of fifteen cents which must be paid on the car, and the daily return ticket which can be obtained only at the company's office at either end of the trip, are the only rates of fare established by respondent between Coopersburg and Allentown.

The complainant avers that respondent issues a monthly commutation fare from other points on its lines about the same distance from Allentown at a much lower rate, and therefore contends that he is discriminated against, and petitions that he be granted the lower commutation rate accorded to the citizens of the aforesaid towns and places located on other divisions of the Transit Company's system.

While respondent admitted that there are certain towns and places on other branches of its system, located about the same distance from Allentown as Coopersburg that have a lower rate of fare, it also established the fact in the testimony offered that there are other towns and localities on the Coopersburg line situated about the same distance from Philadelphia, Norristown and other centers of population as Coopersburg is from Allentown that have a higher rate of fare than the people of Coopersburg.

From the various facts and administrative features educed at the hearing, it appeared quite conclusively that existing local conditions are always a factor which must be considered in the work of arranging a correct schedule of rates on the different lines of a transportation plant. The size of the cars operated on a line, the frequency of the service furnished, the density of the population of the adjacent territory, the grades and gen-

Elias Sassaman vs. Lehigh Valley Transit Co.

eral alignment of the road-bed, the annual outlay required for repairs and up-keep on the different branch lines all figure more or less in the rate problem, and must be considered up to a certain point in their proportionate bearing upon the matter.

Since the hearing held in this proceeding, the respondent company, with a view of meeting the wishes of the complainant in part, and of maintaining thereby a spirit of harmony and co-operation between the Transit Company and its patrons, has written to the Commission that it is willing "To issue commutation tickets for travel between Coopersburg and Allentown at the rate of twenty-five cents for a round trip, and between Centre Valley and Allentown at the rate of sixteen cents for a round trip, such tickets, in each case, to be bound into books containing twenty-five round trips and to be good for use only on local cars and during the calendar months within which the same were issued, but only when presented by the purchasers in person, accompanied by the book themselves."

This proposed change in the rate of fare has been submitted to the complainant by the Commission for comment. In his answer to the foregoing readjustment of rates, the complainant contends that the charge of discrimination preferred in the complaint is not removed and asks for a still further reduction in the rates. He requests that he be permitted to purchase for two dollars and seventy cents (\$2.70) "a monthly book containing twenty-five round trip tickets with full transfer privileges within the corporate limits of the city of Allentown," and for three dollars (\$3.00) "a book containing twenty-seven round trip tickets with transfer privileges, between Allentown and Coopersburg, good for at least one calendar month"; and that he be permitted to ride between Allentown and Centre Valley on either of two commutation books containing twenty-five and twenty-seven round trip tickets respectively which can be obtained at the rate of ten cents for one round trip.

It therefore appears that the proposed rates are not satisfactory to the complainant, and the Transit Company as intimated in its letter submitting the proposed reduction does not feel warranted to offer any further concessions in the matter. The Commission accordingly has made a careful examination of the various local conditions affecting the point at issue, and also of the general principles that must be recognized in the problem of rate making when the transportation service of a

Rates and Fares on Newly Constructed Lines.

general trolley system is purely local on some lines and inter-urban and less frequent on other divisions. After a full consideration of all the different phases and factors involved in the matter, the Commission hereby issues the following order:

ORDER.

And now, to wit, April 21, 1914, it is hereby ordered:

(1) That the number and extent of the fare zones between Coopersburg and Allentown remain the same as heretofore.

(2) That the single return ticket for twenty-five cents issued at the office of the Transit Company at Coopersburg and Allentown continue in effect in the same manner and form as heretofore.

(3) That a commutation ticket book containing twenty-five (25) round trip tickets, good for the calendar month for which it is purchased, be issued as follows:

(a) Good between Coopersburg and Allentown, with full transfer privileges within the corporate limits of the city of Allentown, for four dollars and fifty cents (\$4.50), thus making it at the rate of eighteen cents (18c) a round trip.

(b) Good between Centre Valley and Allentown, with full transfer privileges within the corporate limits of the city of Allentown, for three dollars and seventy-five cents (\$3.75), being at the rate of fifteen cents (15c) a round trip.

(4) That upon compliance with the order the case be marked closed.

IN THE MATTER OF ESTABLISHING RATES AND FARES ON
NEWLY CONSTRUCTED LINES.

Public Service Commission. Tariff Circular No. 2.

BY THE COMMISSION, June 17, 1914.

On newly constructed lines of road, including branches and extensions of existing roads, local rates and fares, and also joint rates and fares, may be established in the first instance to and from points on such new lines by posting tariffs, or supplements to tariffs, of such rates or fares issued by the carrier owning or operating such newly constructed lines or by joint agent acting for it under power of attorney, and filing the same with the Commission one day in advance of effective date. Such tariffs or supplements must bear notation that they apply

William G. Blough *vs.* B. and O. R. R. Co.

to or from points on newly constructed lines to or from which no rates or fares from same points of origin or to same points of destination have applied by giving reference to this rule, immediately below the effective date, as follows:

"Issued under authority of Tariff Circular No. 2 of The Public Service Commission of the Commonwealth of Pennsylvania of June 17, 1914."

Tariffs or supplements to tariffs issued by other carriers establishing rates to or from or via such newly constructed line may be issued only upon statutory notice or special permission for shorter time. It will be the Commission's policy to grant such reasonable permissions as are necessary to give carriers and shippers fullest efficiency of such new lines.

WILLIAM G. BLOUGH *vs.* BALTIMORE AND OHIO RAILROAD COMPANY.

Railroads—Facilities.

Where a railroad company delivers freight to one consignee, at the end of a branch line, it should furnish other consignees and shippers the same facilities.

Public Service Commission, File No. 1100.

WALLACE, Commissioner, June 18, 1914.

On July 24, 1913, William G. Blough, a resident of Jerome, Somerset County, complained to The Pennsylvania State Railroad Commission that the Baltimore and Ohio Railroad Company refused to carry freight consigned to him and other persons at Jerome, a point on a branch line of said railroad, about six miles from Holsopple, in Somerset County, and that said railroad discriminated against the merchants doing business in Jerome, and prayed the Railroad Commission to grant relief from this alleged discrimination.

Negotiations were carried on between the complainant and the Commission and the railroad company for some time, and the matter was undetermined when the Public Service Commission Law became operative.

The complaint was then set down for hearing on the informal complaint submitted by Mr. Blough and the answer made by the Baltimore and Ohio Railroad Company, and three

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hearings were held by the Commission, and an investigation made by its representative on the grounds.

The undisputed facts in the case are that Jerome is a mining community of some 2,000 persons, located at the end of a branch of the Baltimore and Ohio Railroad Company, which branch leaves the main line at Holsopple; that it has been the practice of the railroad company to refuse to deliver freight consigned to Jerome at Jerome, making it necessary for the consignee to haul the same from Holsopple overland. The company based this refusal on the ground that the amount of freight consigned to Jerome and the amount moving from Jerome was so small that it would be unprofitable to establish a station at that point.

After the very careful investigation referred to, the Commission is of the opinion that inasmuch as the Baltimore and Ohio Railroad Company delivers freight at Jerome, consigned to the Penn Mercantile Company, it should afford other consignees and shippers the same opportunities that it furnishes the Penn Mercantile Company, and it therefore recommends that the Baltimore and Ohio Railroad Company construct and maintain a side track, at a convenient place, for the use of patrons in the town of Jerome. In considering the location of this side track, the testimony showed that it could be located at the east of the switches of the Jenner-Quemahoning Coal Company, and accommodate more of the prospective users than at any other point, the general location selected being approximately 1,000 feet from the places of business of a large majority of the users of the railroad.

The Commission therefore directs that the siding to be constructed shall be located at a point to be selected by the Baltimore and Ohio Railroad Company, within a certain tract of land marked on a blue print offered in evidence, and known as Exhibit 1-G, 27-A, and that said siding shall be capable of accommodating six cars, and that at this siding the railroad company shall erect a freight station, of the type generally erected by said company at its non-agency stations, and that an order to this effect be drawn.

ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having

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been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, to wit, June 18, 1914, it is ordered, That the Baltimore and Ohio Railroad Company construct a side track, capable of accommodating six cars, and a freight station in connection therewith, of the type suitable for non-agency stations, at some point on the north side of the right of way of the Jerome Branch of said railroad, and within the following described tract of land: Beginning at a point marked on Exhibit No. 1-G, 27-A, filed in this case as point 181/23.2; thence along the northern line of said right of way in a westerly direction a distance of 1,300 feet, more or less; thence in a northerly direction to the southern line of a road, marked on said exhibit as "Public Road"; thence along said road in a southeasterly direction 1,350 feet, more or less, to a point; and thence in a southerly direction to the place of beginning.

That said railroad company establish at said place a station for the handling of freight, of the type known as non-agency station.

PENNSYLVANIA UTILITIES COMPANY *vs.* LEHIGH NAVIGATION
ELECTRIC COMPANY.

*Public Service Companies—Contracts—Entry Upon Territory
Embraced in Charter—Power of Commission—Act of July
26, 1913.*

Since the Act of July 26, 1913, went into effect, public service companies can only be incorporated upon the determination by the Public Service Commission that the approval of the application is necessary or proper for the service, accommodation, convenience or safety of the public.

When a public service company, acting within its charter rights, undertakes to make a contract with a municipality, the subject matter of the contract is still within the control of the Commission.

The provision of the act that no contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission seems plainly to apply, without regard to the time at which the public service company may have been incorporated.

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There is no provision in the act which, in specific language, empowers the Commission to exclude a public service company, incorporated prior to the going into effect of the act, from territory to which its franchises apply.

Under Section 1 of Article I of the act, public service companies are divided into two classes; corporations and all persons engaged for profit in the same kind of business. Paragraph "a" of Section 2, of Article III, applies to the first class, paragraph "b" to the second class.

The descriptive word "proposed," used in Section 2 of Article III of the Act, cannot be applied to a corporation in existence, with all its powers and franchise, before the passage of the act.

The Public Service Commission has no power to prevent a corporation, incorporated prior to the passage of the Act of July 26, 1913, from entering upon territory described in its Charter.

Public Service Commission. No. 200.

PENNYPACKER, Commissioner, July 9, 1914.

The petition of the complainant sets forth that it is a corporation duly incorporated under the laws of Pennsylvania, having the right, by its charter, and by purchases of and mergers with other corporations "to supply light, heat and power, or either of them, by electricity" to certain townships of Pike, Monroe, and Northampton counties, and to the Boroughs of Stroudsburg, East Stroudsburg, Bangor, East Bangor, Pen Argyl, Wind Gap, Bath, Nazareth, Glendon, Portland and the City of Easton; that it has been furnishing electric light and power to these municipalities for periods running from three to twenty years; that its system of distribution and local supply are sufficient to provide service of the territory so occupied by it; that the respondent, the Lehigh Navigation Electric Company, was formed by the merger of certain electric companies, and, by its charter, approved January 6, 1913, was authorized to do business in, *inter alia*, certain townships of Monroe and Northampton Counties; that it has, apart from securing its chartered rights, done nothing in these two counties; that the respondent, since July 26, 1913, "has proceeded to invade the territory thus occupied and served by your petitioner"; that the territory covered by the petitioner's corporate franchise "is now occupied by it with electric plants representing a large investment; that it is prepared and ready to serve the entire community, and to serve at as low a rate as can be furnished by any one consistent with a proper service, and

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that the respondent "is about to invade the said territory for the purpose of carrying on a ruinous competition which will result in no benefit to the public, or to those financially interested."

The petition set out twelve instances of negotiations, or attempted negotiations, by the respondent, with municipalities and individuals within the territory described. It averred that the respondent "is thus seeking, attempting and intending to enter the territory thus controlled and served by your petitioner; that this is not necessary for the public convenience or necessity, nor for the proper and efficient serving of the public," and that the respondent, prior to the passage of the Act of July 26, 1913, had no right in the premises, other than accrued to it by virtue of having obtained charters and "had not begun to exercise any of its rights, powers, franchises or privileges."

The petition prays the Commission to "order, decree and direct that the said defendant refrain from invading or attempting to invade the territory already occupied and served by your petitioner, and from disturbing and attempting to disturb the business relations already existing or about to be created between the members of the public of that district and your petitioner and to cease and withdraw all operations in your petitioner's district."

In its answer filed, the respondent, *inter alia*, "demurs to the whole of said petition and for cause of demurrer shows— (a) That upon the face of said petition the petitioner is not entitled to the relief claimed; (b) That this Commission has no jurisdiction, under the provisions of the act approved July 26, 1913, to grant the relief claimed by the petitioner."

The question which is raised by the averments of the petition and the answer in the nature of a demurrer, may be stated as follows: Has the Commission authority to prevent a corporation which is a public service company, incorporated before the passage of the Act of July 26, 1913, but which has not begun the exercise of its rights, from entering upon the territory prescribed by its charter, because of the fact that this territory is already occupied by another public service company rendering adequate service?

It is plain that if this question be answered in the affirmative, and the authority so conferred be exercised by the Commission, the result is a complete nullification of the charter of

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the respondent. If an electric light company cannot enter upon the territory in which it has been granted power by the legislature to exercise its franchises and privileges, it can do nothing. It is frankly conceded that there is no specific grant of such authority to the Commission to be found in the language of the act. Since the act went into effect, public service companies can only be incorporated, upon the determination of the Commission, that the approval of the application is "necessary or proper for the service, accommodation, convenience or safety of the public." When a public service company, acting within the rights granted by its charter, undertakes to make a contract with a municipality, the subject matter of the contract is still within the control of the Commission. The act provides that "No contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission." This provision seems plainly to apply, no matter at what time the public service company may have been incorporated, but there is no provision of the act which goes so far as to empower the Commission, in specific language, to exclude a public service company incorporated prior to the going into effect of the act, from entering upon the territory to which its franchises apply. It may want to supply individuals within that territory. It may with the consent of the Commission, supply municipalities there. There is, on the other hand, a specific provision bearing upon the subject which seems to deny such authority. Section 12 of Article III provides:

"Every public service company shall be entitled to the full enjoyment and exercise of all and every the rights, powers and privileges which it lawfully possesses or might possess at the time of the passage of this act, except as herein otherwise expressly provided."

It was argued, however, with much vigor, that Section 2 of Article III does not give necessary authority. This section provides as follows:

"Upon the approval of the Commission, evidenced by its Certificate of Public Convenience, first had and obtained, and not otherwise, it shall be lawful for any proposed public service company—(a) To be incorporated, organized or created, * * *;" (b) To begin the exercise of any right, power, franchise or privilege, under any ordinance, municipal contract or otherwise."

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The contention is that since the respondent had only been chartered and had not begun to exercise any of its powers before the act went into effect, it is not now entitled to begin such exercises without the approval and certificate of the Commission. To give such a construction to the paragraph would be to bring it into conflict with Section 12 of the same article heretofore cited. The whole act must be considered and each part of it be given its due weight, in order that a consistent construction can be reached, if it be at all possible, from the language used. It is entirely possible to give full weight to the words of this paragraph without being compelled to reach the conclusion contended for by the complainant.

Under Section 1 of Article I of the act, public service companies consist of two classes, i. e., corporations and "all persons engaged for profit in the same kind of business."

Paragraph "a" of the section under consideration applies only to the incorporation, organization and creation of chartered companies. It therefore became necessary to add a paragraph to cover the other class of public service companies, consisting of persons engaged for profit in the same kind of business. This appears to have been the purpose of paragraph "b." Such an interpretation harmonizes all of the related sections of the act, and is strengthened by the use of the word "proposed." This descriptive word cannot be applied to a corporation in existence with all of its powers and franchises before the passage of the act. It fits exactly the case of a combination of persons, or an individual intending to engage for profit in that kind of business, but who do not become a public service company until they begin the exercise of the rights conferred upon them.

For these reasons, it is the opinion of the Commission that it has no authority to prevent the respondent from entering upon the territory described in its charter, and that, assuming the facts alleged in the petition of the complainant to be true, the complaint ought to be dismissed.

ORDER.

This case being at issue, upon petition and answer on file, which answer, *inter alia*, sets up the want of power and authority in the Commission to grant the relief prayed for, and the case having been duly heard and submitted by the parties, and the Commission having, on the date hereof, made and filed

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of record a report containing its conclusion upon the aforesaid question of law, which said report is hereby referred to and made a part hereof:

Now, to wit, July 9, 1914, IT IS ORDERED, That the prayer of said petition be refused, and that the said petition be and the same is hereby dismissed.

APPLICATION OF THE HARMONY ELECTRIC COMPANY PROTEST
OF PENNSYLVANIA POWER COMPANY.

*Public Service Companies—Contracts with—Municipalities—
Competition.*

On an application for the approval of a contract between a public service company and a municipality, the size of the municipality, the attitude of the community with respect to the proposed service, the relative merits of bids submitted and the general principle of competition under existing conditions should all be given due weight.

It is a matter of common observation that where the policy of promoting competitive traffic between corporations engaged in public service business is too freely encouraged, especially in communities of limited population, the results are disastrous to all interested parties.

The community that consumes the commodity, the utility that furnishes the service, the general public that invested in good faith, must all be properly safe-guarded when a public service company is invited to enter a municipality to do business under competitive conditions.

The Public Service Commission is not justified in permitting competition anywhere nor in taking such action as may invite it, unless the area and population to be served, the needs of the community or the prospects of development reasonably show that the public welfare demands it.

A public service company, located in a small municipality where it is rendering adequate and satisfactory service, is entitled to protection from competition that may endanger its future existence.

Under a system of regulation such as provided by the Public Service Company law, it is safer to draw the line against rather than in favor of competition that appears to be of doubtful propriety.

Public Service Commission. Municipal Contract Docket,
No. 60.

BRECHT, Commissioner, July 3, 1914.

In re application for approval of contract between the Harmony Electric Company and the Borough of Ellwood City,

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the record shows that on January 31, 1914, an application was filed with the Public Service Commission by the Harmony Electric Company, whose office is located at Pittsburgh, Pennsylvania, for the approval of a contract made with the Borough of Ellwood City, in Lawrence County, Pennsylvania, to supply the aforesaid borough with electric current. The contract submitted for approval was entered into by the respective parties to it for a period of ten years on the 3d day of January, 1914, under an ordinance approved by the borough council on the last day of December, 1913.

The petition of the company sets forth that the Harmony Electric Company was incorporated under the laws of Pennsylvania "for and carrying on the business of supplying light, heat and power by means of electricity, to the public," that by virtue of an ordinance of the Borough of Ellwood City, "the contract set forth in said ordinance has been duly entered into between the parties;" that the said borough can obtain its "necessary electric current more economically than itself can manufacture the same."

A protest was filed in due course of time by the Pennsylvania Power Company, located and operating in the Borough of Ellwood City, against the approval of the contract of the petitioner by this Commission. It is alleged in the protest that the application should be refused on the ground that the Harmony Electric Company has no facilities nor equipment of its own to supply current; that it has not sufficient capital to make adequate provision to supply current to the various communities it has undertaken to furnish under its charter; that in the judgment of the representative business men of the borough aforesaid the contract should be disapproved; that the bids submitted by the Pennsylvania Power Company were a better offer, from the standpoint of the borough's interests, than the bid of the petitioner; that the protestant company has facilities to furnish current far superior to those at the command of the applicant, and that the said company "has been serving the community of Ellwood City with singular efficiency for years."

At the hearing held in this proceeding the attention of the Commission was called to the following facts respecting the status of the petitioner: The Harmony Electric Company was organized on December 31, 1913, by the consolidation of twenty-six (26) small electric companies, with a capital in the

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aggregate of \$130,000; a few days later, in January following, the merger or consolidated company was re-organized and the capital stock reduced to \$25,000, the total amount of stock now authorized by the aforesaid Harmony Electric Company.

On the same day the merger was completed, the Harmony Electric Company leased the power plant of the Pittsburgh, Harmony, Butler and New Castle Railway Company from that corporation at an annual rental of \$18,000. This power plant is located, as was testified, about nine miles from Ellwood City, and heretofore was used and will continue to be used under the present arrangement to supply the railway company with power, to operate its lines of cars. Under the terms of the lease the electric company must not only supply the railway company with power, but is required to keep up all necessary repairs and improvements of the plant in question.

Testimony was offered to show that the power plant leased had sufficient generating capacity to supply current to all the communities the light company expects to serve and sufficient power to operate the lines of the railway company. It was also stated, and the fact not controverted, that since the lease went into effect there has been no construction of additional transmission lines in connection with the plant, nor have any changes or improvements been made in the power plant itself whereby the distribution of current to Ellwood City might be more easily effected and maintained.

According to evidence submitted at the hearing, the respondent to this proceeding, the Pennsylvania Power Company, started operations in Ellwood City about twelve years ago, and has supplied that municipality with electric current ever since. The company has a capital stock of \$400,000, and owns a plant equipment in the borough representing an investment of approximately \$350,000. The power plant operated by it consists of two 500 kilowatt steam turbines and two 625 kilowatt water turbines which are about being supplemented by connections with an outside power plant of 30,000 kilowatt capacity, whereby a supply of current can be obtained in case of emergency or accident. The light and service furnished to the borough, it appears, were adequate and satisfactory. On January 7, 1914, the contract, under which the Pennsylvania Power Company supplied the Borough of Ellwood City with electric current, expired.

On the 22d of September, 1913, the secretary of the bor-

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ough council wrote to the Pennsylvania Power Company and to the Ellwood Electric Company, subsequently merged by letters patent into the Harmony Electric Company, stating that he was "authorized to receive bids for furnishing the borough with electric current, for a five-year contract, and a ten-year contract, in accordance with enclosed ordinance.

When the bids received were opened on October 7, 1913, it was found that the bid of the Elwood Electric Company, later Harmony Electric Company, was a flat rate of 1.5 cents per kilowatt hour, that of the Pennsylvania Power Company a flexible rate of 2.2 cents per kilowatt hour based upon a sliding scale so adjusted that the respondent contends that in a ten-year contract under conditions as they exist in Ellwood City the proposed bid would produce an average rate of 1.27 cents per kilowatt hour.

The committee, believing that the offer of the Ellwood Company was the lower bid, accordingly recommended that the contract be awarded to that company. When the respondent company learned that its bid was rejected, it was led to believe that the bid was not understood, and some time in December following, it presented a supplemental or alternative bid providing for a flat rate of 1.7 cents for a period of one year, or a flat rate of 1.5 cents for five years with the privilege extended to the borough of renewing the rate at the expiration of the first five-year period for five years longer. It also permitted the sliding bid submitted at the first instance in October to stand. It further offered at the expiration of its contract in January, 1914, to furnish current at one and one-half cents per kilowatt hour, which it has been doing since that time, and will continue to furnish current at the aforesaid rate until it shall receive notice from the borough council to discontinue such service.

On the 31st day of December, 1913, an ordinance was approved giving the Ellwood Electric Company the right to furnish electric current to the borough of Ellwood City. A few days later on the 2d day of January, 1914, a "contract for electric service was made and entered into between Ellwood City and the Elwood Electric Company, which contract was assumed on that same day by the Harmony Electric Company by which the contracting company agreed to furnish electric current at the flat rate of 1.5 cents per kilowatt hour for a period of ten years beginning January 7, 1914.

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A clause, known as Section 7, was written into the ordinance to protect the borough in case of any failure on the part of the light company to furnish current of the quality and character and in the amount required by the agreement. This particular clause was not satisfactory to many of the citizens because it was believed that it did not adequately protect the borough and insure continuous service. Therefore, when the new council went into office in January, 1914, a new ordinance was passed repealing the ordinance of the preceding December under which the contract was awarded. The burgess, however, vetoed the repealing ordinance and was sustained in his veto. Thereupon council passed a resolution, by a vote of 5 to 4, requesting this Commission to disapprove the contract which the borough had made with the Harmony Electric Company.

This action of council was supplemented by a petition signed by sixty of the most prominent business men of the community, which was forwarded to the commission, joining in the request from council for the disapproval of the contract.

In this proceeding the size of the municipality, the attitude of the community with respect to the proposed service, the relative merits of the bids first submitted, and the general principle of competition under conditions such as exist at Ellwood City, should be given due weight and consideration in reaching a conclusion.

Ellwood City is a small municipality of about 4,500 people and shows during the past decade the ratio of increase in population that is usually found in communities of that size. There is no present indication of any special development in its industrial life nor any other special inducement that would warrant several public service companies to enter this particular field and engage in the business of supplying electric current.

For a period extending over twelve years the electric current of Ellwood City has been furnished by a company that has over \$300,000 invested in plant equipment within the borough limits. Testimony was offered showing that the service given was sufficiently adequate to meet all the requirements of the community, and that in a period of four years there has been a total interruption of only six minutes during the regular hours of lighting.

It is now proposed that a contract given to a new company

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to furnish current from a railway power house nine miles distant be approved, although the new company has no visible asset in plant equipment excepting a lease, and although the trend of sentiment in the community, as reflected in a resolution passed by the present council and a petition signed by the leading business men, is against such approval.

Furthermore the relative merits of the bids submitted have been a source of more or less dispute and contention between the parties in interest. The situation has been further complicated by the injection of the supplemental bid on the part of the respondent company which offers the same flat rate as the one which was accepted when the contract was awarded. This second or supplementary bid was presented on the ground, as respondent contends, that the bid on a sliding basis, submitted in the first instance, was evidently not understood, since it is able to demonstrate, from the amount of current now being consumed in Ellwood City, that the so-called sliding bid was lower than the one accepted.

The fact that the present council in January, only a few weeks after the contract-ordinance was approved by the old council on the last day of the preceding December, passed a resolution by a vote of 5 to 4 asking this Commission for a disapproval of the contract, and the additional fact that the representative business men joined by petition in the request of council, indicate that there is quite a division of opinion in the community of Ellwood City concerning either the relative merits of the bids originally submitted or the status of the bids now before council.

But the chief point at issue in this proceeding is the principle of competition between public utilities under conditions as they now exist at Elwood City. The record shows that the Pennsylvania Power Company is located in Elwood City and has an investment of \$350,000 in a plant equipment within the the borough limits; that the Harmony Electric Company has leased a power plant nine miles from the borough limits and contends that it is ready to begin operations as soon as its contract is approved and a certificate of Public Convenience issued by this Commission. In the event of the approval of the contract, there will be two competing companies operating in a small municipality where one of these companies was heretofore able, without taxing its capacity, to furnish all the light that was required and of a quality that was wholly satisfactory

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to the people of the community. Under the conditions as existing, it could hardly be contended with success that it would in any wise be an advantage to Ellwood City or to the two companies competing to allow such a contingency to arise.

It is a matter of common observation that where the policy of promoting competitive traffic between corporations engaged in public service business is too freely encouraged, more especially in communities of limited population, the practice is followed as a rule by consequences that are disastrous to all the interested parties. The community that consumes the commodity, the utility that furnishes the service, the general public that invested in good faith, must all be properly safeguarded in their rights and interests when a public service company is invited to enter a municipality to do business under competitive conditions.

The spirit of the act creating this commission contemplates that this very thing be done. Before a certificate of Public Convenience is issued, it must be established that the required service is necessary or proper for the accommodation, convenience or safety of the public.

The Commission is not justified in permitting competition anywhere nor taking such action as may invite it, unless the area and population served, the needs of the community, or the prospects of the municipality as based upon its growth and development reasonably show that the public welfare demands it.

This principle of protection must also be extended to the public utility to the end that the individual citizens who have invested in its plant equipment in good faith may be duly protected in their interests. Therefore, a public service company located in a small municipality where it is rendering adequate and satisfactory service, where it has invested thousands of dollars in a plant, where it can furnish all the service which the community may require, where an additional plant if permitted to be established would make it extremely hazardous for either company to maintain itself, is entitled to the same protection under the law when there is an invasion of its vested rights and interests as the citizens of that community when a public utility company trespasses upon their rights. This idea is based upon the principle that the power or authority to regulate the service of a public utility by law carries with it as a corollary the duty to protect the property of the

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utility whenever that is threatened with consequences that may endanger the future existence of the company.

This general view that competition between public utilities must be restrained under certain conditions and not encouraged too readily is in accord with the reports and opinions of the public service commissions of several of the leading states in the country. In Vol 2 of its reports the Wisconsin Commission said:

"Active and continuous competition between utilities, furnishing the same service to the same locality, seems to be out of the question. This has been shown by experience. Such competition is also contrary to the very nature of things. Two distinct and separate corporations are not likely to remain separate very long after it becomes clear that the service rendered by both can be more cheaply and more effectively furnished by only one of them."

This is substantially the view taken by the commissions of New York, New Jersey, Massachusetts, and other states. The language of the New York Commission of the First District is as follows:

"Practically all utilities are so situated that but one can economically and satisfactorily serve a community."

The New Jersey Commission held:

"In the case of ordinary industrial concerns competing or desiring to compete in serving the public, the traditional presumption is in favor of permitting such competition. * * *

* * * This presumption, however, commonly fails in the case of public utilities operating under franchises."

The same general view is advanced by the Public Service Commission of the State of Massachusetts in the following language:

"Competition is sure to be expensive, even though for a time apparently economical and profitable. * * * *
The temporary advantage to a portion of the public is reasonably sure to be followed by an undue burden upon the public as a whole through the larger capital demanding a return, much of it representing unnecessary duplication of properties as well as losses."

The Commission is not unmindful of the fact that the line is not always clearly drawn between competition that might be encouraged and that which should be denied. But under a system of public regulation, such as is provided by the act

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under which the Public Service Commission of the Commonwealth exercises administrative powers, it is safer to draw the line against rather than in favor of competition that appears to be of doubtful propriety. This seems to be the proper view to take of the matter, since there is no remedy through the action of the commission to prevent the harm that will be done to the business interests of the community by unwise competition when once established; whereas under the regulating powers of the Commission, which in effect may be said to have all the checks and restraints of normal, well-balanced competition, there can be no harm done to the community by the corporation left in sole control of the business of furnishing the required public service of a municipality.

Therefore, in view of the fact that Ellwood City is a small municipality supplied by a public utilities company with light that is admitted to be entirely satisfactory and in all respects adequate to meet the needs of the community; that the two companies to this proceeding are now offering to furnish light to the borough at the same rates, that the borough is seriously divided in the matter of the approval of the contract, the trend of sentiment being apparently against it, and that the experience of public utilities in other places shows that two companies in active competition could not supply a small borough like Ellwood City with proper service at reasonable rates and continue in business for any length of time, the Commission is of the opinion, that competition under such conditions should be restrained and not permitted to enter the said municipality, and accordingly it recommends that the approval of the petitioner's contract in this proceeding be refused and the application dismissed.

ORDER.

This case being at issue upon petition and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

NOW, to wit, July 9, 1914, IT IS ORDERED: That the petition in this proceeding be and it is hereby dismissed.

PETITION OF THE BOROUGH OF BUTLER.

Grade Crossings—Viaducts—Cost of Construction—Apportionment.

Public Service Commission. Application Docket No. 1.

PENNYPACKER, Commissioner, July 16, 1914.

The Borough of Butler situated in the County of Butler, has a population of about twenty-five thousand. The Conoquenessing Creek flowing through a narrow valley between rather high hills divides the town into two parts. Upon the north side live about twenty thousand people, and upon the south side five thousand. Center Avenue is the principal thoroughfare, and crossing the creek, it connects the two parts of the borough.

The double track main line of the Pittsburgh, Bessemer and Lake Erie Railroad Company, operated by the Bessemer and Lake Erie Railroad Company, crosses Center Avenue at grade, and runs immediately north of the creek. This railroad does a large freight business, and trains running east and west cross Center Avenue at frequent intervals both day and night.

The main track and two sidings of the Pittsburgh and Western Railroad Company, operated and owned by the Baltimore and Ohio Railroad Company, cross Center Avenue at grade a short distance south of the creek. All of the passenger and freight trains of the Northern Division of the Baltimore and Ohio Railroad Company, all of the passenger and freight trains of the Buffalo, Rochester and Pittsburgh Railroad Company, and the passenger trains of the Bessemer and Lake Erie Railroad Company cross Center Avenue during the day and night. Cars and trains from the yards of the Baltimore and Ohio Railroad Company, which lie directly to the east of Center Avenue, are daily shifted over this crossing. The Butler Passenger Railway Company, or its successor, the Pittsburgh and Butler Passenger Railway Company, has tracks in the streets in both parts of the borough, but has no tracks on Center Avenue which cross the railroads or the creek.

At an election held November 17, 1911, the electors of the Borough of Butler authorized the municipal authorities to increase its indebtedness in the sum of \$90,000.00 for the purpose of constructing an elevated street or highway from the end of East Wayne Street at McKean Street, an extension of Center Avenue on the north side of the creek, to Fairview

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Avenue on the south side of the creek, and along Fairview Avenue to Center Avenue. Thereupon the municipal authorities by ordinance enacted June 4, 1912, ordained the opening of a public street from the eastern end of East Wayne Street in the Borough of Butler to a point on Fairview Avenue, north of Center Avenue, of the width of forty-five feet, including footways, to cross the rights of way of the above mentioned railroads, and to be an elevated public street having a clearance "of at least twenty-seven feet over the rails of the Pittsburgh, Bessemer and Lake Erie Railroad, and at least twenty-two feet over the rails of the Pittsburgh and Western Railroad" and "to be supported on pedestals set in pairs."

The petition of the Borough of Butler set forth the above facts *inter alia*, and alleged that the proposed structure was in accordance with a survey of the borough engineer and plans submitted to the Commission, that the estimated cost of the entire improvement exclusive of damages to private property is \$89,914.50, that the damages to private property will not be in excess of \$10,000.00, that the borough had been unable to come to an agreement with the railroad companies and the street railway company affected, and that "the proposed highway is necessary for the accommodation of the public, and will provide a safe, easy and convenient means of travel between the two parts of the borough and will practically eliminate all of the travel over the railroad grade crossings on Center Avenue, excepting vehicle travel to and from the Baltimore and Ohio freight depot."

The petition then prayed the Commission to issue a certificate of Public Convenience for the proposed highway, to approve the route, and form of construction not to exceed fifty feet in width, to approve the provision of the ordinance providing the terms and manner in which a street railway or trolley company may cross and use the highway, and to decree that one-half of the cost of the structure be paid by the railroads.

The Pittsburgh and Western, the Baltimore and Ohio, the Pittsburgh, Bessemer and Lake Erie and the Bessemer and Lake Erie Railroad Companies made answer, setting forth *inter alia* that there were several other better and less injurious locations for said viaduct, that the proportion of cost they were asked to pay is unjust and unreasonable, that inasmuch as no grade crossing is abolished over said railroads or any of them, and only an additional burden is imposed, they should

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not be required to contribute anything, that the County of Butler should be made a party and be required to contribute, and that the petition is incomplete and defective.

The Butler Passenger Railway Company made answer setting forth in substance that it already had the right by ordinance to occupy any street or highway, that the limitations in the ordinance to be imposed on it are illegal, and that the payments required by the ordinance to be paid by it are unreasonable.

The Borough of Butler subsequently filed an amendment to its petition, asking leave to make the County of Butler a party respondent, to which the county filed an answer denying the right of the borough to require it to become a party to the proceeding.

The Commission, in an effort to reach a correct solution of what is conceded to be a difficult and complicated situation, held three hearings, at no one of which did any of the respondents present testimony. It sent its engineer to the Borough of Butler, and he made to it an elaborate written report. Two members of the Commission went to Butler and made a personal examination of the situation.

The town of Butler is built upon rather high hills, and is divided into two parts by the creek running through a narrow valley, along which are the railroad tracks. The crossing at Center Avenue is a dangerous and much obstructed grade crossing, so much so, that the Butler Passenger Railway Company has never laid tracks to run between the two parts of the town.

The proposed elevated structure is an attempt after years of effort and consultation to solve the difficulty. As shown by the plans filed with the Commission, it will be laid out approximately parallel with Center Avenue from a point in McKean Street, a continuation of Center Avenue in the north part of the town to a point on Center Avenue in the south part of the town. Where it crosses the railroads at an elevation, it will be about one hundred and fifty feet east of Center Avenue.

Some light upon the value of the proposition is given by the conduct of the parties. The Pittsburgh and Western Railroad Company and the Baltimore and Ohio Railroad Company operating the Pittsburgh and Western Railroad, filed a bill in equity in the Court of Common Pleas of Butler County to restrain the proposed construction, and the Court refused the

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injunction asked. The Supreme Court on appeal, affirmed the decree.

The Pittsburgh, Bessemer and Lake Erie Railroad Company and the Bessemer and Lake Erie Railroad Company, after having filed an answer to the petition of the Borough of Butler, came before the Commission with a subsequent petition, in which they say that "after investigating the Butler situation and having due regard for the interests of the Borough of Butler and of your petitioners, and after giving due consideration and study to the problems presented, and having in mind a comprehensive plan for taking care of the other crossings in said borough, are of the opinion that the elevated street which the Borough of Butler proposes to construct and for which it now asks this Commission to issue a Certificate of Public Convenience is the best solution of the situation, and is one step in a comprehensive plan for eliminating the grade crossings in the Borough of Butler."

Counsel for the Butler Passenger Railway Company, at the hearing agreed that the company would not take any advantage of its right, should such right exist, to cross the structure by virtue of preceding ordinances, and said, "we are willing to submit ourselves to the Commission on the sole question as to the proportion of the cost of the structure which is to be placed on our company."

It is true that the proposed construction does not do away entirely with the grade crossing at Center Avenue, but it is averred in the petition of the borough and not denied, that this crossing will be practically eliminated. The testimony was that "It would take practically all of the pedestrian travel away from Center Avenue and take it over this structure, and it would take a great percentage of the freight traffic from crossing the Bessemer." And again: "It would practically eliminate almost all the travel on Center Avenue with the exception of those going down to the Bessemer depot, because the others would all go over the viaduct."

The proposed construction, should it be carried into effect, will be of great benefit to the citizens of the borough, since it will furnish them with a means of access and transportation between the two parts of the town without the necessity of crossing the railroads at grade. It will be of benefit to the Butler Passenger Railway Company, for the reason that it will enable that company to connect its now several tracks,

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and must increase its opportunity to furnish facilities for the traveling public. It will be of great benefit to the railroads, because to a large extent the dangers, inconveniences, and liability to damages existing at the grade crossing at Center Avenue, the main avenue of the town, will be removed.

An effectual means of eliminating all of the grade crossings in Butler would be to require the railroads to elevate all of their tracks. When this suggestion was made by the Commission at the hearing, it was vigorously opposed by counsel for the railroads upon the grounds that the enormous expense to them would make the plan practically impossible. The topography of the ground at this place is such, that the elevation of the tracks would require a long distance. The cost it was estimated, would be over \$2,000,000.00.

After giving careful consideration to the whole subject and duly weighing the advantages and disadvantages, it is the opinion of the Commission that the plans and specifications for the construction of the viaduct ought to be approved, and the Certificate of Public Convenience ought to be issued, and that the Borough of Butler proceed with and complete the work in accordance with the plans and specifications.

The Act of July 26, 1913, provides in Article V, Section 12, that the Commission shall have exclusive power "to order any crossing aforesaid, now existing or hereafter constructed at grade, or at the same or different levels, to be relocated or altered, or to be abolished, according to plans and specifications to be approved, and upon just and reasonable terms and conditions to be prescribed by the Commission."

It further provides in another paragraph of the same section "The expense of the said construction, relocation, alteration, or abolition of any such crossing, shall be borne and paid, as hereinafter provided, by the public service company or companies or municipal corporations concerned, or by the Commonwealth, either severally or in such proper proportions as the Commission may, after due notice and hearing, in due course, determine, unless the said proportions are mutually agreed upon and paid by those interested as aforesaid."

In the present case, the parties as appears from the record, have been unable to agree upon their respective proportions of the expense. The commission gave to them due notice and held three hearings, offering to them and each of them the opportunity to present what they might consider to be important

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for their interest and welfare in respect to this and the other features of the case. It therefore under the statute, becomes the duty of the commission to determine this question of expense.

The commission has failed to find any sufficient ground upon which the County of Butler could be required to pay any part of such expense, and as to the county, the case is dismissed.

It is the opinion of the Commission that the expenses consisting of the cost of construction, the damages, if any, that may be awarded to adjacent property owners, and all other necessary expenses, if there be any, ought to be borne and paid in the following proportions, to wit:

Thirty (30%) per cent. to be paid by the Borough of Butler.

Thirty (30%) per cent. to be paid by the Pittsburgh and Western Railroad Company, and the Baltimore and Ohio Railroad Company, jointly or severally.

Thirty (30%) per cent. to be paid by the Pittsburgh, Bessemer and Lake Erie Railroad Company, and the Bessemer and Lake Erie Railroad Company, jointly or severally.

Ten (10%) per cent. to be paid by the Butler Passenger Railway Company, or its successor, the Pittsburgh and Butler Passenger Railway Company: Provided, however, that this ten (10%) per cent. may be settled upon the basis of tolls to be paid by the Butler Passenger Railway Company to the Borough of Butler, upon such terms as shall be mutually satisfactory to them, should the borough and the railway company be able to make such an agreement.

ORDER.

This case being at issue upon petition and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matter and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

NOW, to wit, June 16, 1914, IT IS ORDERED: That the BOROUGH OF BUTLER proceed with and complete the work of constructing a viaduct in the said borough, over the tracks of the Baltimore and Ohio Railroad Company and the tracks of the Bessemer and Lake Erie Railroad Company, in

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accordance with the plans and specifications filed with the Commission, and referred to in the above report;

That the expenses of said construction, consisting of the cost of construction, the damages, if any, that may be awarded to adjacent property owners, and all other necessary expenses, if there be any, be borne and paid in the following proportions, to wit:

Thirty (30%) per cent. to be paid by the Borough of Butler.

Thirty (30%) per cent. to be paid by the Pittsburgh and Western Railroad Company, and the Baltimore and Ohio Railroad Company, jointly or severally.

Thirty (30%) per cent. to be paid by the Pittsburgh, Bessemer and Lake Erie Railroad Company, and the Bessemer and Lake Erie Railroad Company, jointly or severally.

Ten (10%) per cent. to be paid by the Butler Passenger Railway Company, or its successor, the Pittsburgh and Butler Passenger Railway Company: Provided, however, that this ten (10%) per cent. may be settled upon the basis of tolls to be paid by the Butler Passenger Railway Company to the Borough of Butler, upon such terms as shall be mutually satisfactory to them, should the borough and the railway company be able to make such an arrangement.

That a Certificate of Public Convenience issue in accordance with this order.

SPRING BROOK LUMBER COMPANY *vs.* BELL TELEPHONE COMPANY OF PENNSYLVANIA.

Telephone Companies—Rates—Discrimination.

Public Service Commission. No. 1039.

WRIGHT, Commissioner, April 9, 1914.

In this case the Spring Brook Lumber Company, on February 18, 1913, filed with the Pennsylvania State Railroad Commission a complaint against the Bell Telephone Company, alleging that the rates for service between Scranton and Moosic, where the complainant is located, were unfair and discriminatory, and later, numerous residents of Moosic joined in the complaint.

The Bell Telephone Company answered the complaint, admitting the facts as set forth and alleging that owing to the

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growth of the telephone business it had become necessary to include the complainant in a new local exchange in place of allowing them to remain, as they had previously been, in the Scranton Exchange. It also denied that the rates charged under the new arrangement were unfair and unjust, and submitted the question of the rates and the advisability of establishing the new exchange to the judgment of the Commission.

On the issue thus joined a hearing was held on June 19, 1913, and after this hearing the Commission caused an investigation of the situation to be made by its representative.

From this investigation and the testimony produced, it appears that the locating of the new telephone exchange including the town of Moosic, was done by the telephone company after a careful consideration of the needs of the district and with a view to improving the service rendered to its patrons in that vicinity.

It appears that the location and regulations adopted are in accord with the best telephone practice, and that the action of the telephone company in this case is fully justified by the circumstances.

The Commission is therefore of the opinion that the evidence produced does not show that the rates and practices of the telephone company in this case are unfair, unreasonable or unjust, and for this reason the complaint is hereby dismissed and the case closed.

ORDER.

AND NOW, to wit, April 9, 1914, the finding, determination and order made by Commissioner Wright, dismissing the complaint in this proceeding, is ratified and confirmed and made the order of this commission.

THOMAS E. BALDRIDGE *vs.* MCKEESPORT AND DUQUESNE
BRIDGE COMPANY.

Bridges—Tolls—Reasonableness.

Public Service Commission. No. 165.

PENNYPACKER, Commissioner, June 19, 1914.

It appearing that the bridge of the McKeesport and Duquesne Bridge Company, the respondent, was erected in 1891, twenty-

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three years ago; that its present value is not less than \$175,100, exclusive of real estate by testimony valued at about \$18,000; that its entire net earnings during that whole intervening period amount to \$48,099, being less than three per cent, per annum upon the value of the bridge; that it has never paid a dividend to its stockholders; that for one year it was in the hands of a receiver; that it has a bonded indebtedness of \$150,000; that the tolls charged as to all vehicles except automobiles, are less than those permitted by statute and an order of the court of quarter sessions, and that the testimony as to the reasonableness of the tolls charged for automobiles is conflicting, it is the opinion of the Commission that the complaint has not been sustained and ought to be dismissed.

ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

NOW, to wit, June 19, 1914, IT IS ORDERED: That the complaint in this proceeding be and it is hereby dismissed.

IN RE TRANSPORTATION OF RAILROAD CONTRACTORS, THEIR
MEN, MATERIALS AND EQUIPMENT.

*Railroads—Transportation of contractors, men, material and
equipment.*

Under the Act of July 26, 1913, a railroad company may transport contractors in its employ, their men, tools, materials, supplies and equipment, used in and about the performance of the work being done by the contractor for such railroad company, without collecting the ordinary rates of compensation for such transportation. Under such conditions the contractor is, in effect, an employee of the carrier.

Public Service Commission. Administrative Ruling No. 3.

BY THE COMMISSION, July 23, 1914.

The Commission has been requested in several communications from railroad companies of the commonwealth, to ex-

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press its opinion upon the question whether or not such carriers may lawfully transport contractors, their men, material and tools, equipment and supplies, in and about the performance of work being done by the contractor for such carrier, without charging and collecting tariff rates of compensation for such transportation, as in the ordinary case of transportation service being rendered to the public.

The question thus presented is a close one under the provision of The Public Service Company Law. The act provides in Section 1, sub-section (d) of Article II, that the rates or other compensation "for any service rendered or furnished" shall be set forth in the published tariffs of the company, and by Section 7 of Article III, it is made unlawful for any carrier, after January 1, 1914, to render or furnish any service of the kind or character rendered or furnished by it, except in accordance with such published tariffs.

Section 8 of the same article prohibits all unjust discrimination, as therein defined, as well as all undue or unreasonable preference. The Constitution of the commonwealth prohibits the granting by any common carrier of any free passes, except to officers and employees of the carrier issuing such passes.

The Commission has given the subject careful consideration and as a result thereof has concluded not to construe the law as preventing a common carrier from according free or reduced rate transportation to a contractor, his men, materials, tools, equipments and supplies necessary to be transported by such contractor in the performance of the work being done for the carrier by the contractor, inasmuch as the contractor, under such circumstances, is to all practical intents and purposes, an employee of the carrier, engaged in work for the carrier, and the transportation is, in substance and effect, transportation rendered by the carrier to itself.

IN THE MATTER OF REQUIRING PUBLISHED RATES AND FARES
TO CONTINUE IN EFFECT FOR THIRTY DAYS.

*Public service companies—Tariffs—Change of published rates
or schedules—Excursions.*

A tariff or schedule, filed and posted, must be allowed to become effective and remain so for at least thirty days before change therein, but this does not effect tariffs or schedules containing rates for excursions.

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sions limited to certain designated periods under General Order No. 4, of January 21, 1914.

Public Service Commission. Conference Ruling No. 1.

By THE COMMISSION, July 23, 1914.

The Public Service Company Law, approved July 26, 1913, Article II, Section 1, (f) provides in part as follows:

"To make no change in any tariff or schedule, which shall have been filed or published or posted by any public service company in compliance with the preceding sections, except after thirty days' notice to the Commission and to the public, posted and published in the manner, form and places required with respect to the original tariffs or schedules, which shall plainly state the exact changes proposed to be made in the tariffs or schedules *then in force*, and whether an increase or decrease, and the time when the proposed changes will go into effect;" * * *

The term "then in force" as employed in the paragraph above quoted must be interpreted as requiring that a tariff or schedule filed and posted must be allowed to become effective and remain in effect for at least thirty days before any change may be made therein, but this will not affect tariffs or schedules containing rates for excursions limited to certain designated periods under authority of General Order No. 4, of 21st day of January, 1914.

IN THE MATTER OF APPLICATION OF RATES AT INTERMEDIATE POINTS.

Common Carriers—Rates at intermediate points.

Rules No. (1) and No. (2) of General Order No. 7, of April 18, 1914, will be applied to rates for movements wholly within the state of Pennsylvania both when the next more distant point named in the tariff is located in another state, and when the next more distant point, though in the state of Pennsylvania, is reached by an interstate line.

The rule and notation referred to in (1) and (2) may be placed on tariffs on less than statutory notice.

Public Service Commission. Conference Ruling No. 2.

By THE COMMISSION, July 23, 1914.

The Public Service Company Law, approved July 26, 1913, Article III, Section 9, (a) provides:

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"It shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate, for the conveyance of passengers or property of the same class for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance;" * * *

As an assistance to carriers in compliance therewith and to facilitate the publication of tariffs, General Order No. 7 was issued, April 18, 1914, and provided:

(1) When tariffs are provided with suitable rule to govern the application of rates at intermediate points, the same rates as are published in such tariffs from (or to) the next more distant point named in the tariff are made to apply from (or to) intermediate points; and

(2) Tariffs bearing on their title page, the notation prescribed in General Order No. 7, may be supplemented upon one day's notice to the Commission and the public, establishing thereby at intermediate points commodity rates which do not exceed those in effect from (or to) the next more distant point named in the tariff;

The Commission has this day made the following ruling:

The above rules will be applied to rates for movements wholly within the state of Pennsylvania both when the next more distant point named in the tariff is located in another state, and when the next more distant point, though in the state of Pennsylvania, is reached by an interstate line.

The rule and notation referred to in clauses (1) and (2) above may be placed upon tariffs on less than statutory notice.

COMMONWEALTH vs. C. W. BURNETT.*Vinegar—Adulteration—Evidence—Act of May 21, 1901.*

On the trial of an indictment, under the Act of June 8, 1897, P. L. 168, as amended by the Act of May 21, 1901, P. L. 275, evidence on behalf of defendant that the use of water is necessary in the manufacture of vinegar from cider or apple juice is properly excluded.

Motion for new trial and in arrest of judgment. Quarter Session of Dauphin County, No. 191 September Sessions, 1913.

W. M. Hargest and *A. H. Woodward* for Commonwealth.

W. W. Armstrong and *C. C. Stroh* for defendant.

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McCARRELL, J., July 16, 1914.

The defendant has been convicted of selling "as and for apple or cider vinegar a certain substance, article and compound which was not then and there the legitimate produce of pure apple juice and not made exclusively of apple cider." The indictment charges a violation of the Act of June 18, 1897 (P. L. 168), as amended by the Act of May 21, 1901 (P. L. 275), and is substantially in the words of the act.

The defendant admitted the making of the sale and that the vinegar sold contained approximately 20% of water added to it in the process of manufacture. With this admission the Commonwealth closed its case. The defendant asked that the jury be instructed to acquit on the ground that the facts proved did not show any violation of the statute. This request was refused and an exception noted for the defendant. The defendant then offered to prove by James D. Bashford that he was a cider vinegar manufacturer at Lyons, New York; that he manufactured the vinegar sold in this case; that the capacity of his factory was about 15,000 barrels a year; that he was familiar with the usual methods of making cider vinegar and that the use of water is necessary as part of the process of manufacture and is so recognized in the practice of cider vinegar manufacturers. Upon objection by the Commonwealth this evidence was excluded and an exception noted for the defendant. Various other offers were made of like character relating to the process of manufacture; the acetic acid content of the effluent produced by manufacturing process and the supposed necessity of adding water to adapt it to domestic use. All these various offers were objected to as immaterial and irrelevant and they were excluded with exception to defendant. The substance of all these offers was to show that the use of water was necessary in the manufacture of vinegar from cider or apple juice, and that the use of water was necessary to reduce the acetic acid content so as to adapt it to domestic use. The defendant contends that if the use of water is customary and necessary the act must be so construed as to permit its use. We are unable to assent to this proposition. The legislature must be presumed to have been familiar with the methods of manufacturing vinegar from cider or apple juice, and if the use of water was necessary for any purpose in the process of manufacturing, provision for its use would undoubtedly have been made. The language of the statute

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seems to us too clear to permit any doubt as to the legislative intent. It expressly forbids the sale or offering for sale as apple or cider vinegar any article (a) "which is not legitimate product of pure apple juice," or, (b) "vinegar not made exclusively of said apple cider." The legitimate product of pure apple juice means a product derived from apple juice by the operation thereon or therein of natural laws without any addition, subtraction or artificial manipulation. The second paragraph of the prohibition "not made exclusively of said apple juice" explains the first and makes the statutory meaning clear beyond peradventure. The rules of statutory construction are well settled.

In *Mercer vs. Watson*, 1 Watts 339, it is held that "Statutes are generally to be understood and construed according to the ordinary meaning and common acceptance of their terms."

In *Commonwealth vs. Wells*, 110 Pa. 467, it is said, "We are to look to the words in the first instance and when they are plain we are to decide on them. If they be doubtful we are then to have recourse to the subject matter."

In *Commonwealth vs. Matthews*, 210 Pa. 392, it was held that testimony to explain the legislative intent or to point out the objects the legislature had in view is wholly inadmissible.

The general principles of statutory construction as gathered from numerous cases are clearly stated in *Endlich on Statutes*, Section 4, page 7, as follows:

"Where the words of a statute are plainly expressive of an intent not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such cases, what the consequences may be. It has therefore been distinctly stated from early times down to the present day that judges are not to mould the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship or of what in their view is right and reasonable or is prejudicial to society; are not to alter clear words, though the legislature may not have contemplated the consequence of using them; are not to tamper with words for the purpose of giving them a construction which is supposed to be more consonant with justice than their ordinary meaning. Where by the use of clear and unequivocal language capable of only one meaning anything is enacted by the legislature it must be enforced, even though it be absurd or mischievous. If the words go beyond what

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was probably the intention, effect must nevertheless be given to them. They cannot be construed contrary to their meaning as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the intention conveyed may be, it must render its full effect."

It is not the duty of the court to make the law reasonable, but to expound it as it stands according to the real sense of the words.

The first section of the Act of May 21, 1901, contains the prohibition above referred to. The second section relates to vinegar made by fermentation, and declares that it shall be branded "fermented vinegar." It also provides that all vinegar made wholly or in part from distilled liquor shall be branded as "distilled vinegar" and "all such distilled vinegar shall be free from coloring matter added before, during or after distillation and from color other than that imparted to it by the process of distillation, and shall contain not less than four per centum by weight of absolute acetic acid." This is the only provision in the statute in regard to acetic acid and it relates only to distilled vinegar and not to apple or cider vinegar. The statute fixes no per centage of acetic acid for cider or apple vinegar, but as already stated, clearly prohibits the sale of any article as apple or cider vinegar which is not the legitimate product of pure apple juice or not made exclusively of said apple cider. The suggestion contained in the several offers made by defendant, above referred to, that the use of water was necessary in order to reduce the acetic acid content does not seem to us to have any relevancy to cider vinegar, with respect to the acetic acid of which, the statute is entirely silent. It is clearly intended to prevent any fraud or imposition upon the public in the sale of cider vinegar, and there is no contention that the act is in itself unconstitutional.

We are therefore constrained to give full force and effect to the words found in the first section of the statute and conclude that the defendant has been properly convicted of a violation thereof. The motion in arrest of judgment and for a new trial is accordingly overruled and the commonwealth is at liberty to move for the entry of judgment upon the verdict.

PENNSYLVANIA RUBBER COMPANY, WESTMORELAND SPECIALTY COMPANY, PITTSBURGH LAMP, BRASS AND GLASS COMPANY, MCKEE GLASS COMPANY, AMERICAN WINDOW GLASS COMPANY vs. PENNSYLVANIA RAILROAD COMPANY. IN RE-RATES ON COAL FROM PENN, BIDDLE, IRWIN AND HAHNTOWN TO JEANNETTE AND GRAPEVILLE, PENNSYLVANIA.

Railroads—Freight rates—Discrimination—Switching movements.

A lower rate on coal, when moved in producers' cars than when moved in the cars of the carrier, is illegal.

In determining whether particular rates are reasonable, and especially in deciding whether particular rates are unjustly discriminatory, it is discretionary with the Public Service Commission whether a valuation of all the property of the public service company shall be made; and if the Commission decides that a valuation is necessary, the statute provides what the Commission *may* consider, not what it *must* consider in arriving at a fair valuation.

A railroad company is entitled to receive from its schedule of rates, fares and charges, a fair return upon the value of its property; but this broad question does not necessarily arise in deciding whether the particular rate or rates applying to but one or a few articles are discriminatory.

The movement of coal in cars from the colliery to the main line of a railroad, then for a short distance on the main line to a branch, then over the branch to the siding of the consignee is not a switching movement, in the ordinary acceptance of that term.

Public Service Commission. No. 211 Complaint Docket.

JOHNSON, Commissioner, July 23, 1914.

Jeannette is situated on the main line of the Pennsylvania Railroad, 26.6 miles east of Pittsburgh, and 4.1 miles west of Greensburg. Grapeville is also on the main line of the Pennsylvania Railroad, one-half mile east of Jeannette.

The complainants in this proceeding are five companies having manufacturing plants at or near Jeannette and Grapeville. All but one of the plants at Jeannette are located on the so-called Jeannette Branch, a short road 1.3 miles in length, branching southward from a point on the main tracks of the Pennsylvania Railroad, between Jeannette and the first station

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to the west, which is called Penn. The other plant near Jeannette is located on the Bull Run Branch, which extends for nine-tenths of a mile northward from the main track of the Pennsylvania Railroad, also from a point between Jeannette and Penn.

The industries at Jeannette and Grapeville secure coal from collieries located near Penn, Biddle, Irwin, and Hahntown. Penn, Biddle, and Irwin are located on the main line of the Pennsylvania Railroad. Penn Station is one and one-half miles west of Jeannette; Biddle about three miles from Jeannette; Irwin about five miles from Jeannette, and Hahntown, which is located on the Youghiogheny Branch, a short distance from the main line of the Pennsylvania Railroad, is about six miles from Jeannette.

The collieries near Irwin and Biddle are owned by the Westmoreland Coal Company; those near Penn and Hahntown by the Penn Gas Coal Company, which company however, is owned by the Westmoreland Coal Company. All four collieries are controlled by the Westmoreland Coal Company. Both the Penn Gas Coal Company and the Westmoreland Coal Company are owners of a large private car equipment which they have used in shipping the coal purchased by the companies complainants in this proceeding.

Prior to June 1, 1914, the rate on coal, when shipped in producers' cars, was \$2.50 per car from each of the four collieries to consignees' sidings at Jeannette. The rate to Grapeville on coal moved in producers' cars was \$3.00 per car, the rates to Grapeville being quoted only from Penn and Biddle. Higher rates were charged on coal shipped in cars owned by the railroad company, the rates to Jeannette being \$5.00 per car from Penn, and thirty cents per long ton of 2,240 pounds from Biddle, Irwin, and Hahntown. The rates to Grapeville were twenty-eight cents per long ton from Penn and thirty cents per ton from Biddle, Irwin, and Hahntown. Effective June 1, 1914, the Pennsylvania Railroad Company withdrew the rates of \$2.50 per car to Jeannette and \$3.00 per car to Grapeville on coal moved in producers' cars, and established a new schedule of rates on coal moved in railroad owned and all other cars, the rates now in effect to Jeannette being fifteen cents per long ton from Penn (Penn Gas Slope No. 5), twenty cents per ton from Biddle, twenty-five cents from Irwin, and thirty cents from Hahntown. The present rates to Grapeville are

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fifteen cents per long ton from Penn, twenty-five cents from Biddle, and thirty cents from Irwin. The rates in effect both prior to and subsequent to June 1, 1914, and the distance which the coal moves by the several rates are shown by the accompanying table, taken from the record of the proceeding.

While the special rate on coal shipped in producers' cars was in effect, all coal was handled in producers' cars at \$2.50 per car to Jeannette and \$3.00 per car to Grapeville. The withdrawal of these rates and the substitution of the rates per ton indicated in the table effected a large increase in the freight rates. The increased burden is borne by the complainants in this proceeding.

Coal is purchased by the complainants F. O. B. at the colliery, the freight being paid by the buyer of the coal. At the present time the rate paid by the complainants is the fifteen cents per ton charge from Penn to Jeannette and Grapeville. For the standard style hopper car, which is largely used, this amounts to \$7.50 per car, or about three times the charge paid by consignees at Jeannette prior to June 1, 1914.

The issues raised in this case involve three questions.

First.—Is it lawful and equitable for the rate to be lower on coal shipped in producers' cars than when shipped in cars belonging to the carrier?

Second.—Are the rates that were put in effect June 1, 1914, reasonable?

This involves incidentally the question—

Third.—Whether the service performed for the rates charged is a switching movement or a road haul.

I. Is it lawful for a railroad to charge lower rates on coal when shipped in cars owned by the shipper than when transported in cars owned by the carrier? The coal freight agent of the Pennsylvania Railroad—the official by whom the rates under consideration were fixed—testified that special rates at Jeannette and Grapeville on coal when shipped in producers' cars would be the only instance of such preference granted by the Pennsylvania Railroad. At no other point in the state is there any lower rate granted on coal shipped in private equipment than when moved in railroad owned cars. The witness stated that he considered the preference was one that could not lawfully be made.

The granting of a special rate on coal when moved in pro-

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ducers' cars enabled certain buyers of coal mined at the collieries owned and controlled by the Westmoreland Coal Company to obtain an advantage or preference in rates that other buyers of coal at the same collieries could not secure. The users of coal at Jeannette and Grapeville were granted a preference not allowed other consumers of coal. Furthermore, the existence of a lower rate on coal when moved in producers' cars would enable the owners of the collieries, who have the power to determine whether cars or railroad equipment shall be used, to decide what buyers should enjoy the lower rate and what consumers of coal should pay the higher charge. A system of charges that makes possible such discrimination in the rates paid by the buyers of transportation would be a violation of the fundamental principles of the common and statutory law regarding the charges of common carriers.

Again, if it were lawful for the carrier to charge a lower rate on coal shipped to Jeannette and Grapeville from the collieries owned or controlled by the Westmoreland Coal Company, it could be lawful only upon the condition that a like lower rate was charged on coal whenever and wherever shipped in producers' cars. The preference in the rate granted to shippers using private instead of railroad cars would have to apply generally to all producers' cars at all points in the state. This is clearly required by Article III, Section 8, of The Public Service Act of July 26, 1913:

Section 8. It shall be unlawful for any public service company—

(a) To charge, demand, collect or receive, directly or indirectly, by any special rate, rebate, drawback, abatement or other device whatsoever, from any person or corporation, for any service rendered or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect, or receive from any other person or corporation for a like and contemporaneous service under substantially similar circumstances and conditions.

(b) To make or give any undue or unreasonable preference or advantage in favor of or to any person or corporation or any locality, or any particular kind or description of traffic or service, in any respect whatsoever; or to subject any particular person or corporation or locality, or any particular kind or description of traffic or service, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

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The rates on coal shipped to Jeannette and Grapeville are paid by the consumers, and the granting of a lower rate when the coal is moved in producers' cars is clearly an abatement in the rate that would be secured by a limited number of coal consumers, and by consumers located in only one section of the state. The preference granted is clearly in violation of Paragraph B of Section 8, Article III, above quoted. Accordingly, it must be decided, and it is held that the lower rate on coal to Jeannette and Grapeville, which prevailed prior to June 1, 1914, when moved in producers' cars, than when transported in railroad owned cars, was illegal.

II. Are the rates now in force on coal to Jeannette and Grapeville from Penn, Biddle, Irwin, and Hahntown just and reasonable?

It is contended in the brief submitted by one of the complainants that this question cannot be decided upon the evidence before the Commission, because the defendant has not presented and the Commission has not determined "the capital investment of the respondent company necessarily employed in or about the particular service." The attorney for the complainants argues that "Section 20 of Article V of the act specifically sets forth the matters which shall be considered by the Commission in the determination of the reasonableness of any given rate. It must determine and consider the fair value of the property of the public service corporation in order to ascertain whether the particular rate under investigation which it is proposed to increase, brings in a fair return."

The attorneys for the plaintiff have misread the act. The statute gives the Commission authority, after hearing, to determine whether rates are unjust or unreasonable, "or unjustly discriminatory or unduly or unreasonably preferential," and if the rates are found to be unduly discriminatory or preferential, the Commission shall prescribe the "maximum, just, due, equal and reasonable rates." (Article V, Section 3.) It is provided by Section 20 of Article V that the Commission has the power to determine the fair value of the property of the public service corporation "whenever it shall deem such valuation or determination necessary or proper under any of the provisions of this act," and the same section of the law provides that "in ascertaining and determining such fair value, the Commission may determine every fact, matter or thing which in its judgment does or may have any bearing on such value."

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In determining whether particular rates are reasonable, and especially in deciding whether particular rates are unjustly discriminatory or unduly preferential, it is discretionary with the Commission whether a valuation of any or all of the property of a public service company shall be made, and, if the Commission decides that a valuation is necessary, the statute prescribes what the Commission *may*, not what it *must* consider, in arriving at a fair valuation.

A railroad company, as the complainant argues, is entitled to receive from its entire schedule of rates, fares and charges, "a fair return upon a reasonable value of the property at the time it is being used for the public," (San Diego Land Company vs. National City, 174 U. S. 739), but this broad question does not necessarily arise in deciding whether the particular rate or rates applying to but one commodity or to but few articles is unjustly discriminatory or preferential. If the contention of the plaintiff were valid, and a valuation were required to decide upon every complaint regarding local rates or fares, the Commission would be powerless to afford effective relief to complainants and the statute could accomplish but little in the regulation of transportation charges.

The changes made in the rates on coal to Jeannette and Grapeville, effective June 1, 1914, were the withdrawal of the \$2.50 per car rate from Penn, Biddle, Irwin, and Hahntown to Jeannette, and of the rate of \$3.00 per car to Grapeville from Penn and Biddle on coal moved in producers' cars; the reduction in the rate on coal shipped in railroad owned cars, Irwin to Jeannette, from thirty cents to twenty-five cents per ton, Biddle to Jeannette from thirty cents to twenty cents, Biddle to Grapeville from thirty cents to twenty-five cents, Penn to Grapeville and Pittsburgh Lamp, Brass and Glass Company's siding at Jeannette, from twenty-eight cents to fifteen cents, and the increase in rates on coal shipped in railroad cars from Penn (Penn Gas Slope No. 5) from \$5.00 per car to fifteen cents per ton. In each case the ton is the long ton of 2,240 pounds.

Prior to June 1, 1914, the complainants received practically all the coal in producers' cars at the \$2.50 and \$3.00 rates, which rates must have been assumed by the carrier to have been equivalent to the several rates in force to Jeannette and Grapeville on coal shipped in cars owned by the railroad. If the rates on coal moved in producers' cars were not equivalent

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to the rates on coal moved in railroad cars, one or the other of the two classes of rates must have been illegal, because it is clear that the carrier could not lawfully have had two different rates for the same transportation service.

For the reasons that have been set forth, the abatement in the rate for coal when shipped in producers' instead of railroad owned cars was the granting of an unlawful preference to the users of coal at Jeannette and Grapeville, and the respondent acted in accordance with the requirements of the law in withdrawing the rates of \$2.50 to Jeannette and \$3.00 to Grapeville on coal moved in producers' cars.

There remain two questions to decide: Is the rate of fifteen cents per long ton from Penn (Penn Gas Slope No. 5), to Jeannette and Grapeville reasonable, and are the rates that have been established from Biddle, Irwin, and Hahntown to Jeannette and Grapeville equitably related to the rates from Penn to Jeannette and Grapeville?

The rate of \$2.50 to Jeannette appears, from the record in the proceedings, to have been established in 1893, and it is the opinion of the present coal freight agent of the defendant carrier that this low rate was fixed to enable slack coal, for which there was then little demand, to be marketed. This reason for the establishment of the \$2.50 rate is not admitted by the complainants, and the fact is not established. There is, however, little doubt that the rate was a low one, especially when applied, as it was, to the larger sizes and more valuable grades of coal. The reasons given by the defendant for establishing the rate of fifteen cents per long ton, from Penn to Jeannette, were stated as follows:

By Mr. Bikle:

Q. Now, in fixing this rate at fifteen cents per ton, what led you to regard that as a proper charge?

A. I am of opinion that fifteen cents per ton, considering what a car can earn, the conditions just mentioned of car supply, and other conditions, that fifteen cents is a nominal rate.

Q. Why did you fix the rate from Penn to Jeannette?

A. In order to make it comparative with minimum road haul in that vicinity.

Q. Do you know of anything lower in the territory for similar movements?

A. I do not.

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By Commissioner Johnson:

Q. Can you cite similar movements where the rate is fifteen cents?

A. I think I can recall four or five. These are all distances running from .6 miles to a mile and a half. We have from the Graydon Coal Works on our Conemaugh Division, which was our old West Penn Division, two deliveries in Tarentum; from the Kerr Coal Company, at Lane, which is on the Butler Branch of the same division above Butler Junction, to the town of Freeport; then there is another I think of from the Pine Run Coal & Coke Company from Vandergrift to Hyde Park. We have another that I think of now from Everson, on our Southwest Penn Branch, running down to Uniontown to the town of Scottdale. They are all from .6 miles to a mile and a half.

The same witness, Mr. Clevenger, also testified that there has been such an increase in the size of cars during the twenty-one years, since 1893, as largely to justify the higher rates that were made effective June 1, 1914. It appears, furthermore, that the Pennsylvania Railroad, on the first of April, 1903, advanced its rates on coal ten cents per ton on long hauls and five cents per ton on short hauls, but that the rates to Jeannette and Grapeville were not increased at that time. It was stated by the witness that the Jeannette and Grapeville rates were overlooked and for that reason were not increased along with other coal rates.

The testimony concerning the increase in the size of cars is somewhat contradictory. The witness for the defendant was not informed as to the size of cars that have been used since 1893 in supplying coal to the complainants at Jeannette and Grapeville. A witness for one of the complainants, the Pennsylvania Rubber Company, presented a record of the average lading of the coal cars received by that company from 1903 to 1913, and his figures show but slight increase in the average load. It is hardly possible, however, to accept the record of the Pennsylvania Rubber Company as to the size of cars used by it, as expressive of the average size of cars used generally ten or twelve years ago in supplying consumers with coal at Jeannette and elsewhere. The official statistics collected and published by the Interstate Commerce Commission show that the average capacity of all coal cars owned by the railroads in

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the United States in 1901 was thirty-one tons; in 1907 thirty-eight tons, and in 1911 forty-two tons. The increase in the average capacity of railroad owned coal cars during the decade 1901-1911 was 35½ per cent. From these figures it would appear that if a railroad equipment had been used, and coal cars of average capacity had been employed for supplying coal to consumers at Jeannette and Grapeville, the car-load rate paid in 1901 would have been for the transportation of thirty-one tons of coal, and in 1911 for the movement of forty-two tons. It is a well-known fact that there has been a steady growth in the average capacity of coal cars.

III. It is strongly urged by the complainants that the movement of cars from the colliery at Penn Gas Slope No. 5 to the sidings of the complainants at or near Jeannette is not a line or road haul, but a switching service. The witness for the defendant defined a switching service as a movement or haul "within the jurisdiction of one agency limit," and it is generally understood that a switching service is the movement of a car from one point to another within a station or terminal area. The service performed in the transportation of coal from the colliery at Penn Gas Slope No. 5 to consignee on the Jeannette Branch involves the movement of the car from the colliery to the tracks of the main line of the Pennsylvania Railroad, then the movement of the car over a comparatively short distance on the main line to the Jeannette Branch, and along the Jeannette Branch to the siding of the consignee. This is not a switching service in the ordinary acceptance of the term. It is not a movement from one point to another within a station or terminal area. Although the distance over which the car moves upon the main line of the railroad is short, there is technically at least, a road haul. The service from Irwin, Bidle, and Hahntown to consignees at Jeannette and Grapeville is unquestionably a line or road haul, and not an ordinary switching service. The question as to whether the service for the rates complained of is or is not a switching movement is considered here, not because it was deemed of special importance, but because the point was urged by the complainants. As a matter of fact, switching charges are often a rate per ton instead of per car, and if the services performed by the defendants were held to be a switching movement, the complainants would not necessarily be entitled to rates per car instead of per ton of freight moved.

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. The facts do not indicate the rate of fifteen cents per long ton from Penn (Penn Gas Slope No. 5) to the sidings of the complainants at Jeannette and Grapeville to be unreasonable. Fifteen cents per ton is the lowest short line haul rate on coal charged by the defendant carrier within the state. The present coal rate from Penn, Biddle, Irwin, and Hahntown to Greensburg, 4.1 miles east of Jeannette, is thirty cents per long ton. In relation to the rate to Greensburg, the rate from Penn to Jeannette and Grapeville cannot be considered unreasonably high. The rate of fifteen cents per long ton from Penn (Penn Gas Slope No. 5) to Jeannette and Grapeville is accordingly held to be reasonable.

The rate of twenty cents per long ton from Biddle (Westmoreland Shaft) to Jeannette, is also held to be reasonable.

It does not appear however, that the rate to Grapeville from Biddle should be higher than the rate to Jeannette. The difference in distance is slight, and it is hereby held that the rate from Biddle to Grapeville shall be reduced from twenty-five cents to twenty cents per long ton of 2,240 pounds. The rate of twenty-five cents per long ton from Irwin (South Side Colliery) to Jeannette is held to be reasonable, and it is held that the same rate should apply from Irwin to Grapeville. The rate of thirty cents per long ton from Hahntown (Penn Shaft No. 2) to Jeannette is held to be unreasonable. The difference in distance between Irwin to Jeannette and Hahntown to Jeannette, does not justify a rate from Hahntown five cents higher than the rate from Irwin. The rate from Hahntown to Greensburg being thirty cents, a reasonable rate from Hahntown to Jeannette would be, and is held to be, twenty-five cents per ton of 2,240 pounds.

An order will be entered directing the respondent company to put in force the rates here held to be reasonable, and to make whatever adjustment that may be required to bring intermediate rates in line with those hereby established.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matter and things involved having been had, and the Commission having on the date hereof, submitted and filed of record a report containing its findings of

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Now, to wit, July 23, 1914: It is ordered that the Pennsylvania Railroad Company, respondent, put in force the rates held to be reasonable in the aforesaid report of the Commission, and make whatever adjustment that may be required to bring intermediate rates in line with those established by said report, on or before September 15, 1914.

IN RE PETITION OF THE BOROUGH OF EXETER FOR THE APPROVAL
OF FRANCHISE-CONTRACT GRANTED TO THE CONSUMERS'
ELECTRIC COMPANY OF THE BOROUGH OF EXETER.

Public service companies—Rates—Competition.

The Public Service Commission is about to notify all public service companies to procure apparatus and equipment necessary to enable them to keep records of their service, in accordance with the rules of the Commission, adopted April 9, 1914. When such records are kept the Commission can promptly and definitely determine whether the service rendered is maintained at a proper standard.

Prior to the jurisdiction of The Public Service Commission over utilities, the only method by which municipal authorities could secure improved service or lower rates was by competition.

The efforts of municipal authorities to secure lower rates and better service from utility companies are commendable and should be encouraged. The ultimate effect upon rates deserves most careful consideration when these results are to be accomplished by competition.

The history of utility companies throughout the commonwealth shows that where competing companies operate in the same or adjacent territories, the result has been consolidations and mergers and the status of competition has been maintained for but limited periods.

In authorizing in a community the existence of two or more utilities to supply essentially the same service, consideration should be given to the future effect of such action upon rate investigations or determinations.

When two utilities furnish the same service in a community, there is necessarily a duplication of plant and equipment.

The rate charged by a utility company for the service it renders should yield a fair return upon the value of its plant and equipment and provide a proper allowance for the cost of maintaining its business and for depreciation.

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In a community served by more than one utility, the valuations of property, amounts set aside to cover depreciation and the cost of maintaining the business will inevitably aggregate more than if the community be served by but one utility.

The action of a municipality, in granting franchises to competing public service companies, may result in increasing the rates for the service rendered, instead of lowering them.

A rate regulating body, by approving competition, may create a situation that results in unnecessarily high rates.

Since the passage of the Public Service Company Law, better and improved service from public service companies, with lower or reasonable rates, can be obtained by application to The Public Service Commission, without the burdens and complications of competition.

The Public Service Commission. Municipal Contract Docket No. 34.

TONE, Commissioner, July 21, 1914.

The borough of Exeter, Luzerne County, presented December 27, 1913, its petition, asking for the approval by The Public Service Commission of a franchise ordinance and amendment, giving and granting unto the Consumers' Electric Company of the borough of Exeter, Luzerne County, Pennsylvania, a franchise in said borough.

The petition of the borough states that the said borough was incorporated on the 8th day of February, 1884; that on November 21, 1913, the town council of the borough passed an ordinance authorizing the Consumers' Electric Company of the borough of Exeter to erect and maintain poles, wires, and other necessary appliances upon, over and along the streets, lanes, alleys, and other public places of, and to exercise its franchise in the borough of Exeter; that on February 16, 1913, the council of the borough passed an ordinance amending Section 3 of the aforementioned ordinance by adding the following: "And it is hereby understood and agreed that it is not the purpose or intent, nor is the obligation of this contract, if and when approved by The Public Service Commission of the Commonwealth of Pennsylvania, such as to impair or in any wise affect the exercise by said company of any of the powers vested in it by The Public Service Commission, approved July 26, 1913; that all of the legal steps necessary in the passage and publication of the ordinance have been properly taken and

Petition of Borough of Exeter for Approval of Franchise Contract. performed; that the Consumers' Electric Company of the borough of Exeter has accepted, in writing, said ordinance and the amendment thereto."

Following the receipt of the above petition and the fixing of January 20, 1914, as the date for the public hearing on the same, a protest against the approval of said franchise ordinance was filed by the Citizens' Electric Illuminating Company of Pittston, Penna., alleging that it, the Citizens' Electric Illuminating Company, was duly authorized on the 4th day of October, 1898, by the council of the borough of Exeter, to "erect and maintain poles upon and wires and appliances over and along the streets, lanes, alleys of the said borough for supplying such light, heat, and power or any of them that the said company is or may be authorized to do, and to distribute the same, etc."; that it "did enter upon the streets of said borough with its poles and wires, and since that time has been continuously supplying to the municipality and inhabitants thereof an adequate and sufficient supply of light, heat, and power by means of electricity at reasonable rates"; that it maintains a distributing system in said borough consisting of upwards of twenty-one miles of wire, with approximately 219 poles, together with meters, transformers, and other appliances; that its system and plant have been continuously in operation and entirely adequate to supply all demands for electric current and power in said borough; that the population of the borough is about 3,500; that the borough of Exeter, by reason of its large geographical area and small scattering population does not present a commercially attractive investment field for one company, much less for two; that there is no necessity for two electric light companies to operate within the boundaries, and not enough business to warrant two companies operating therein, in such a manner as to give good and sufficient service, at reasonable rates; that to permit another company to enter said borough will work irreparable injury to the protestant and its investment, and confer no benefit upon the inhabitants of said borough; that such additional company is not "necessary or proper for the service, accommodation, convenience, or safety of the public."

The franchise ordinance, the approval of which is petitioned for, grants a general franchise to the Consumers' Electric Company for supplying electricity to the inhabitants of the borough, subject to various and proper regulations as to erection

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and protection of poles and wires and the use and obstruction of the streets; fixes a minimum monthly charge not exceeding 50 cents per month for any one customer, fixes a maximum rate for current, not exceeding 10 cents per kilowatt hour; limits the term of the franchise to sixty years; provides for use of the company's poles by the borough and free current for its fire alarm system.

The testimony and exhibits presented at the hearings show that the Citizens' Electric Illuminating Company was incorporated April 9, 1888, "for the purpose of supplying light, heat, and power by means of electricity to the public in the contiguous boroughs of Pittston and West Pittston and Hughestown, in Luzerne County, Pa., and to persons, partnerships, and corporations residing therein and adjacent thereto as may desire the same and supply customers with necessary appliances to utilize the same"; and that on December 23, 1889, it surrendered its said charter, and accepted and received a new one in accordance with the Act of May 8, 1889; and on July, 1913, said company was merged with several other electric light companies, retaining its original name in the new "letters patent" issued.

The evidence indicates that the borough of Exeter is adjacent to and joins the borough of West Pittston; that the rates charged and service given in the past have been the same as in the boroughs of Pittston and West Pittston; that the company has never received any complaints as to its service to commercial and residence customers; that there are at present 109 such customers in the borough from whom the gross yearly revenue is about \$4,500.00, the maximum rate being 10 cents per kilowatt hour, and the minimum monthly charge to any one customer being \$1.00; that the generator capacity of the power station aggregates 2,100 kilowatt, on which the maximum demand at any one time is about 900 kilowatt.

Conflicting testimony was presented as to the character of the service which is now, or has been of late, rendered. It was also testified and not contradicted that two lighting companies could not exist in the borough of Exeter.

The evidence and investigations made by representatives of the Commission show that the plant and facilities of the Citizens' Electric Illuminating Company are ample and sufficient for properly serving and supplying all the demands for electric current throughout the territory in which it is authorized to do

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business. The particular complaint against the service, as specified in the testimony, referred to the variation in the intensity of illumination or fluctuation of the lamps, which in as much as the capacity of the plant is shown to be ample, is due, if it exists, either to the improper and insufficient regulation of its equipment at the generating station, or to an improper wire distribution system. The regulation of its equipment at the generating station can be improved by the company either by installing additional regulating devices, or by operating more generators at the times of heavy loads or by both. The distribution system can be diagrammed with reference to the loads on each branch and portion thereof and where found deficient, brought up to a proper standard by additional wiring.

It is provided in the rules relating to supplying gas, electric, water, and steam heat service by utilities, adopted by the Commission April 9, 1914, and since promulgated forthwith, that utility companies shall make systematic inspection and procure the apparatus necessary for and make and maintain complete records of its service in order that representatives of the Commission making examination of such records at any time can determine whether the service being rendered by the utility has been and is sufficient, proper, and satisfactory.

The Commission is about to notify all public service companies to, at once, procure the apparatus and equipment necessary for and to inaugurate the system of keeping the records of their service and inspection as provided for in the said Service Rules. When this is done by the utility, the Commission can then promptly and definitely determine whether the service is maintained at a proper standard, and when and to what extent variations therefrom occur; and the utilities will be required to operate all plants so as to render and give proper and sufficient standard service.

In Article V, Section 18, of the Act of July 26, 1913, it is provided, "When application shall be made to the Commission by any public service company for permission from the Commission to begin the exercise of any right, power, franchise or privilege; or when application shall be made to the Commission by any public service company for any approval under any of the provisions of this act, such approval, in each and every such case, or kind of application, shall be given only if, and when the said Commission shall find or determine that the granting or approval of such application is necessary or

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proper for the service, accommodation, convenience or safety of the public."

The petitioner, the borough of Exeter, requests the approval of the franchise ordinance, in order to provide competition in the supplying of electric current to its residents, for the purposes of securing,—first, better service, and,—second, lower rates for such current.

In the matter of securing improved service over that now rendered, the same result can be accomplished by petition to the Commission for an investigation of the present existing service, and, if the same be found deficient, by the Commission requiring the company now supplying the current to improve its methods, plant and equipment in such manner as the Commission shall direct. Such results will be ultimately effected by the Commission under its system of regulation and inspection about to be inaugurated.

In the matter of lower rates for electric current, no formal testimony or proof was offered by the petitioner against the reasonableness of the rates for residence and commercial lighting now charged by the company furnishing the present service. The petitioner, however, acting in the matter in November, 1913, which was previous to the time of jurisdiction over utilities conferred upon The Public Service Commission, most naturally follows the past custom of inducing and encouraging competition in its endeavor to control or improve the service and rates for electricity supplied to its inhabitants. The efforts of municipal authorities to secure lower rates for services rendered by utility companies are commendable and should be encouraged; but, the final and ultimate effect upon the rates deserves most careful consideration, if it is endeavored to bring about the results by the method of competition.

Previous to the jurisdiction of The Public Service Commission over utilities as provided by the Act of July 26, 1913, and in full effect January 1, 1914, the only method by which municipal authorities could hope for improved service or lower rates, or both, from companies furnishing public service to their communities, was by creating public sentiment therefor and by the means of competition; and, which while it existed, was to some extent productive of the results desired. But the history of practically all utility corporations throughout the commonwealth, shows that where competing companies were operating in the same territory, or even adjacent terri-

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tory, there have inevitably been consolidations and mergers, and the status of competition has remained in effect for but limited periods of time.

Assuming competition to be in effect or now by the approval of the Commission to be established, and assuming a community to be enjoying rates, whether promulgated by the utilities regardless of the cost of plant or cost of service, or otherwise, a time will arrive when a determination of a just and fair rate for the services must be made; and the question must be submitted to the Commission or other authority having jurisdiction at that time. Consideration should, therefore, now be given to the result or future effect in any rate investigations or determinations, of authorization or of the existence in a community of two or more utilities to supply essentially the same service.

Unless by mutual private understanding between utilities, by which each occupies separate territory in a community, in which case there is no actual competition, each competing utility must possess a plant and furnish equipment and supplies sufficient to accommodate its customers and whatever reasonable additional demands may be made upon it, and reasonable facilities for emergencies. This will require each utility to duplicate to a more or less extent the equipment, plant and supplies of the other. In the matter of fixing rates by any commission or other authority, definite rules have been laid down by the courts, that must be followed if the determinations are to be enforced. One of the first considerations is that the fair value of the plant and facilities of the utilities, used and useful in furnishing the service must be determined and considered as one of the principal functions in the fixing of rates. Another consideration of equal importance is that the rate must provide a proper allowance to cover annual depreciation of plant and facilities and the cost of maintaining business.

These principles, clearly laid down by the courts, must be followed in all rate determinations hereafter, and where applied to a community served by more than one utility, the resulting valuations of property, amounts set aside to cover depreciation and the cost of maintaining the business, for several companies will inevitably aggregate more than if the same community be served by one utility. Consequently the valuations thus made and allowances to be provided for out of the

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rates will necessarily result in the fixing and determining of rates materially greater and higher than would occur if but one utility were in operation.

It becomes then impossible for rate regulating bodies, to authorize the establishment of competing utilities in one community, without in the future, when petitioned, or when undertaking to determine and fix the fair rates to be charged by the several utilities in such community, being confronted with the requirement of fixing a valuation for the properties of the utilities and making allowances for the depreciation and cost of maintaining the business, much in excess of what would be the case, had there been no duplication of plant and facilities by competing companies.

It is evident, therefore, that the action of a municipality in granting franchises to competing public service companies, as compared with that of rate regulation by state authority, may produce the contrary effect of increasing rates for service by a public utility, although the opposite result is sought to be obtained by the means of competition; and, it would appear that a rate regulating body, by authorizing or approving competition, may place itself in the anomalous position of voluntarily creating a situation that results in unnecessarily high rates. The ultimate effect upon the rates is the essential point to be determined after a due consideration of all the facts of a situation.

In considering the petition for approval of the franchise ordinance, it is evident that the borough authorities, in November, 1913, clearly acted for the best interests of the inhabitants of the borough; but, now as, since January 1, 1914, The Public Service Company Law is in full force and effect, the results sought by the borough as to better and improved service with lower or reasonable rates can be attained by application or petition relative thereto to the Commission, and in that event without the burdens and complications hereafter arising from competing utilities.

It is therefore not believed by the Commission that the approval of the franchise ordinance is necessary or proper for the service, accommodation or convenience of the public.

The approval of the ordinance is therefore withheld, and the application for its approval is dismissed.

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ORDER.

This case being at issue upon petition and protest, on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of facts and conclusions, which said report is hereby referred to and made a part hereof:

Now, to wit: July 21, 1914. It is ordered: That the petition in this proceeding be and is hereby dismissed.

IN RE PETITION OF THE BOROUGH OF EXETER FOR THE APPROVAL
OF A STREET LIGHTING CONTRACT WITH THE CONSUMERS'
ELECTRIC COMPANY OF THE BOROUGH OF EXETER.

Boroughs—Contracts for lighting streets— Competition.

Where an electric light company has been furnishing light to the inhabitants of a borough for a number of years and has also lighted the streets of the borough under a contract which has expired, and, upon advertisement for bids for lighting the streets, the company submits no bid, the borough is justified in accepting the lowest responsible bid from a company having no plant or system of distribution in the borough. Such action does not create a competitive situation in the borough relative to street lighting.

Public Service Commission. Municipal Contract Docket No. 35.

TONE, Commissioner, July 21, 1914.

The borough of Exeter, Luzerne County, presented December 27, 1913, its petition, asking for the approval by The Public Service Commission of a contract made and entered into December 1, 1913, by the borough with the Consumers' Electric Company of the borough of Exeter, Luzerne County, Penna., for the lighting of the streets and public highways of the borough, for a term of ten years, with thirty-nine or more, standard Westinghouse, direct current series, arc lamps, at a rate of fifty-four (\$54) dollars per lamp per year.

An ordinance of the borough, passed in council, November 7, 1913, and approved by the burgess, November 17, 1913, provided that the borough enter into and execute a contract for

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the lighting of the streets and public highways of the borough with electric arc lamps, or with electric arc and tungsten lamps, or with gas lamps, according to specifications on file in the office of the secretary of the borough; and that upon the adoption of said ordinance and the specifications, the secretary should advertise for one week for sealed proposals to do said lighting; that the proposals should be submitted to the secretary of council, November 28, 1913, and opened by him at a meeting of council, to be held at 8 p. m. on that date; that council should award said contract; and that the burgess and secretary were authorized to execute such a contract on behalf of the borough.

Pursuant to said advertisement for proposals, the Exeter Electric Company, by its president, K. J. Ross, and the Consumers' Electric Company of the borough of Exeter, Luzerne County, Penna., by its attorney, W. L. Pace, presented their sealed proposals to the secretary of council; and the contract for the lighting of the streets of said borough was thereupon awarded to the Consumers' Electric Company aforesaid.

Following the receipt, by the Commission, of the petition of the borough, and the fixing of January 20, 1914, as the date for the public hearing on the same, a protest against the approval of said lighting contract was filed by the Citizens' Electric Illuminating Company, of Pittston, Pa., alleging that it, the Citizens' Electric Illuminating Company, has since 1898, been continuously supplying to the municipality and inhabitants of Exeter, Pa., an adequate and sufficient supply of light, heat, and power by means of electricity at reasonable rates; that its system and plant are entirely adequate to supply all demands for electric current and power in said borough, and the current is supplied whenever and wherever requested; that the population of the borough, according to the census of 1910, was about 3,500; that said company has been furnishing to the borough electricity for street lighting for more than fifteen years; that there never have been any disputes about the contract for said street lighting, nor any complaints of the service rendered; that the approval of the said contract would result in the duplication of the poles, wires and plant now on the streets of the borough, and impose upon the borough an additional burden represented by the cost of said duplication, and create a competitive condition at variance with the spirit and letter of the Public Service Company Law.

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The testimony and exhibits presented at the hearings show that the Citizens' Electric Illuminating Company has been furnishing electric light for the streets of the borough,—first, under a contract from 1898 to 1903, rate not stated; and,—second, under a contract for ten years terminating October 1, 1913, at a rate of \$72.50 per lamp per year, and using therefor 9.6 ampere, 550 watt, open arc type lamps; that from October 1, 1913, the said company has continued its street lighting service without a formal contract, charging at the rate of \$72.50 per lamp per year for three months, and since January 1, 1914, is charging therefor at the rate of \$60.00 (sixty dollars) per lamp per year; that when the borough, during November, 1913, advertised for proposals for street lighting, the Citizens' Electric Illuminating Company did not present any bids; that the proposals received by the borough at that time were, first, from the Consumers' Electric Company of Exeter, at a rate of \$54.00 per lamp per year; second, from the Exeter Light Company at a rate of \$55.00 per year; that the Exeter Light Company was incorporated by K. J. Ross, who is president of the Citizens' Electric Illuminating Company, and others; that neither the Consumers' Electric Company of Exeter, nor the Exeter Light Company, has any plant or equipment.

The protest of the Citizens' Electric Illuminating Company, the testimony at the hearings, and the arguments and briefs of counsel, covered two applications made to the Commission by the borough of Exeter,—one, for the approval of the contract for street lighting, and the other, for the approval of a franchise ordinance granting to the Consumers' Electric Company of the borough of Exeter, the right to erect a plant and equipment upon the borough streets for the purpose of furnishing electricity to the inhabitants of the borough. The latter question, the approval of the franchise ordinance, will be determined by the Commission in another and separate report.

The question involved in the present proceeding is the approval of the contract for street lighting.

Section 11 of Article III of the Act of July 26, 1913, provides that "no contract or agreement between any public service company and any municipal corporation shall be valid unless approved by the Commission," and Section 18 of Article V of the same act provides that "when application shall be made to the Commission by any public service company for any approval under any of the provisions of this act, such approval.

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in each and every such case, or kind of application, shall be given only if and when the said Commission shall find and determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience, or safety of the public."

In accordance with the ordinance passed November 7, 1913, the borough of Exeter advertised for proposals for street lighting, received the same November 28, 1913, and after due consideration, awarded the contract to the Consumers' Electric Company of the borough of Exeter.

The testimony shows that the specifications, proposals, and contract provide for a modern type of arc lamp, to be properly erected and maintained, and at a rate considerably less than the borough had previously been paying.

The protestant, the Citizens' Electric Illuminating Company, which had been formerly furnishing the street lighting service, did not submit any proposals, and therefore, and as is also evidenced by the testimony, had withdrawn from the field as a competitor for the privilege of furnishing the street lighting.

Therefore, the borough council upon the opening of bids, November 28, 1913, was obliged to decide upon one of the several following methods for lighting its streets. It might, *first*, endeavor to secure from a gas company, lights for the streets;—*second*, undertake the construction of a municipal electric light plant,—*third*, endeavor to compel the Citizens' Electric Illuminating Company to continue furnishing its service, which would involve much uncertainty as to what the rates would be, as the same if not mutually agreed upon, would require determination by either The Public Service Commission or the courts, or possibly by both, and at a considerable period of time thereafter,—*fourth*, to accept the bid of the Exeter Electric Company at the rate of \$55.00 per lamp per year;—or *fifth*, to accept the bid of the Consumers' Electric Company of Exeter at the rate of \$54.00 per lamp per year.

The action of the borough in accepting the latter proposition appears to have been the wisest under all of the circumstances, and particularly as they existed on November 28, 1913, and up to December 1, 1913.

The contract entered into December 1, 1913, contains the following provision: "It being understood and agreed that the company not being in a position at the present time to light the streets of the borough as above specified, that said company

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shall have the right to erect such poles and string such wires, within the borough, under the direction of the burgess and street committee of council, as may be necessary to carry out the requirements of this contract."

While full consideration is due and has been given, by the Commission, to the protest of the Citizens' Electric Illuminating Company and to the answer to the same by the Consumers' Electric Company of Exeter, and to the facts as presented by both, it is believed that the more important matter involved is that of the borough of Exeter procuring the lighting of its streets in the most feasible and satisfactory manner that was presented to it on November 28, 1913. Such lighting was an absolute necessity for the borough. The action of the municipal authorities was open to the public and duly authorized and published. It cannot be maintained that the action of the borough created a competitive situation with the interests of the Citizens' Electric Illuminating Company relative to the street lighting, as the officers of that company testify that it had decided not to, and did not submit any proposals for such lighting.

The Commission is of the opinion that the contract for street lighting as submitted is in proper form, and is necessary and proper for the safety and convenience of the public and should be approved; and that the borough of Exeter and the Consumers' Electric Company of the borough of Exeter, be authorized to proceed to fulfill the obligations and carry out the terms thereof.

ORDER.

This case being at issue upon petition and protest, on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of facts and conclusions, which said report is hereby referred to and made a part hereof.

Now, to wit, July 21, 1914. It is ordered that a certificate of Public Convenience be issued evidencing the Commission's approval of the contract between the borough of Exeter and the Consumers' Electric Company of the borough of Exeter for the lighting of the streets of said borough, for a period of ten years.

COMMONWEALTH vs. EDWARD G. SMITH.

Murder—Inquiry as to sanity of accused.

The Act of April 20, 1869, P. L. 78, gives to the courts power to commit to an hospital for the insane any person acquitted of a criminal charge on the ground of insanity.

The Act of May 14, 1874, P. L. 160, gives to the courts power, on application in writing of certain designated officials, to appoint a commission to inquire and report as to the mental condition of any person convicted of crime or acquitted on the ground of insanity.

The Act of May 8, 1883, P. L. 21, relates only to persons convicted and sentenced.

The Act of June 26, 1895, P. L. 388, relates only to persons committed on criminal charges, less than felony.

Prior to trial, the court has no power to direct an inquiry into the mental condition of a person charged with murder.

Petition for commission to inquire into the mental condition of prisoner charged with murder. Oyer and Terminer of Dauphin County, No. 115 January Sessions, 1914.

M. E. Stroup, District Attorney, for commonwealth.

John Fox Weiss and *Wm. H. Earnest*, for defendant.

McCARRELL, J., Aug. 6, 1914.

The defendant, whose father has presented the pending petition, has been indicted for murder and is in our county prison awaiting trial. He is held under a magistrate's commitment. The petition is presented under Section 29 of the Act of May 8, 1883, entitled "An act relative to the supervision and control of hospitals or houses in which the insane are placed for treatment or detention." The twenty-ninth section declares that "the provisions of this act in respect to the admission or discharge of patients, shall not extend to insane criminals in custody. Such persons shall not be received, except when delivered by a sheriff of the county or his deputy, together with an order of the court of the county in which he was arrested or convicted, having jurisdiction of the offense, under the seal of the court and signed by a law judge. Nor shall such criminals be discharged from a hospital or other place of detention for the insane, saving on a like order, and to the sheriff or his deputy producing such order, and while detained as an insane

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person, such criminal shall be so kept as to insure his detention until duly discharged. Whenever any person detained in any jail or prison is insane, or in such a condition as to require treatment in a hospital for the insane, it shall be the duty of any law judge of the court, under whose order the person is detained, upon application, to direct an inquiry into the circumstances, either by a commission, or otherwise, as he shall deem proper, with notice to the committee on lunacy; and if the judge shall be satisfied that the person confined requires treatment in a hospital, he shall thereupon direct the removal of the said person from the jail or prison to a state hospital."

The thirtieth section of the act seems to declare that the act applies only to such persons as have been duly convicted and sentenced by a court, and provides that all persons detained as insane, not duly convicted, and sentenced by a court, shall, as soon as they are restored to reason and are competent to act for themselves, in the opinion of the medical attendant of the hospital, be forthwith discharged. The defendant in this case has not been convicted and sentenced by the court, and according to this section could be discharged by the authorities of the hospital to which sent without any notice to the court whenever such authorities were of the opinion that he was restored to reason. This might entirely prevent a trial and make the administration of justice impossible.

While the language of the latter part of Section 29 is very broad in its terms, we must gather the real legislative intent from the entire act. The act seems to divide the criminal insane into two classes, to wit: persons who have been tried, convicted, and committed to prison as punishment, and persons who have been tried and acquitted on the ground of insanity and committed to prison for the protection of society and their own treatment. The defendant in this case does not fall within either class. Other acts upon the same subject must also be considered.

The Act of May 14, 1874, relates to the same subject and is entitled "An act to provide for the custody of insane persons charged with and acquitted or convicted of crimes." That act provides that when such person becomes insane, application may be made to the court by the warden, superintendent, physician, or any inspector of the penitentiary or prison in which such person is imprisoned or by the general agent of the Board of Public Charities to the court having jurisdiction of the cause.

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These two acts were considered by President Judge Seely in Dux's case, 7 Co. Ct. Rps. 294, and after referring to Sections 29, 30, and 31 of the Act of 1883, he concludes that the only way in which "these three sections can be reconciled is that the criminal insane mentioned in the twenty-ninth and thirtieth sections are the same as those mentioned in the exception to the thirty-first section, to wit: criminal insane duly convicted and sentenced by a court. This construction finds, possibly, some support in the language of the twenty-ninth section prescribing the duty of any law judge of the court under whose order the person is detained."

In Baraboski's case, 9 Co. Ct. Rps. 264, Judge Pershing considers both the Act of 1874 and the Act of 1883, and concludes as follows:

"The Act of May 8, 1883, P. L. 21, Section 29, of which is referred to in the petition as the ground of the application before us, is entitled 'An act relative to the supervision and control of hospitals or houses in which the insane are placed for treatment.' This supervision is committed to the Board of Public Charities. There is nothing in this act which is in conflict with or in any way repeals any of the provisions of the Act of 1874."

If this interpretation of the act be considered correct then the application now before us is not made by any person authorized by the Act of 1874 to present it. These two decisions are in exact accord with respect to the scope of the Act of 1883, and hold that it applies only to persons who have been duly convicted, or acquitted, and sentenced.

This is in accordance with the practice of this court. We have frequently appointed a commission under the twenty-ninth section of the Act of May 8, 1883, P. L. 21, where a person convicted and sentenced to the penitentiary is alleged to be insane, or to require treatment in an hospital for the insane, but never in the case of a person who has not been tried. Our several acts of assembly seem to clearly define the powers of the courts with respect to the commitment of insane persons to hospitals for the insane.

The Act of April 20, 1869, P. L. 78, gives the courts power to commit to an hospital for the insane "any person acquitted of a criminal charge on the ground of insanity."

The Act of May 14, 1874, P. L. 160, is entitled "An act to provide for the custody of insane persons charged with, and

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acquitted, or convicted of crime." The first section of the act, phrased in exact harmony with the title, provides "That whenever any person is imprisoned within the commonwealth, convicted of any crime whatsoever, or charged with any crime, and acquitted on the ground of insanity, application may be made in writing, by the warden, superintendent, physician, or any inspector of the penitentiary, or prison in which such person is imprisoned, or by the general agent of the Board of Public Charities to the court hereinafter named, or any law judge thereof," * * * for the removal of such prisoner to an hospital for the insane, whereupon it shall be lawful for the court, or any law judge thereof, "having immediate cognizance of the crime, with which such person is charged, or of the court by which such prisoner has been convicted, to appoint a commission of three citizens * * * to inquire into and make report upon the mental condition of such prisoner, and upon their report that the prisoner is of unsound mind and unfit for penal discipline, power is given to order the removal of such prisoner to an hospital for the insane."

The Act of May 8, 1883, P. L. 21, is entitled "An act relative to the supervision and control of hospitals or houses in which the insane are placed for treatment." This title does not give any specific notice that power is granted by the act to any court to commit insane persons, or criminals, to any hospital. Whether sufficient notice of the grant of such power is contained in the title it is unnecessary now to consider or decide, as we have already concluded that the act applies only to persons who have been duly convicted and sentenced.

The Act of June 26, 1895, P. L. 388, is entitled "An act to provide for the more immediate relief, care, and support of indigent insane persons committed on criminal charges less than felony. These four acts of assembly grant the only powers committed to the courts of criminal jurisdiction to order the placing of persons charged with crimes or misdemeanors in hospitals for the insane. These powers may be thus briefly summarized:

The Act of April 20, 1869, P. L. 78, grants power to commit to an hospital for the insane "any person acquitted of a criminal charge on the ground of insanity."

The Act of May 14, 1874, P. L. 160, grants power, on the application in writing of certain designated officials, to appoint a commission of three to inquire and report as to the mental

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condition of any prisoner charged with crime, and "convicted or acquitted on the ground of insanity" and upon report that the prisoner is of unsound mind, and unfit for penal discipline, to commit to an hospital for the insane.

The Act of May 8, 1883, P. L. 21, as we have already decided relates, when all its sections are carefully considered, only to the cases of persons who have been duly convicted and sentenced.

The Act of June 26, 1895, P. L. 388, relates only to persons committed on criminal charges less than felony. Whether the Act of May 14, 1874, covers the case of this defendant it is unnecessary now to decide. The petition now before us in his behalf is not presented by any of the officers designated by that statute to present it. After careful consideration we are satisfied that the Act of May 8, 1883, P. L. 21, applies only to persons who have been duly convicted, or acquitted, and sentenced, and are therefore constrained to dismiss the pending petition, because we have not been given authority to consider it, or to make the order prayed for therein. If the inspectors of our county prison are unable to give the defendant the treatment which his condition requires, the Committee on Lunacy of the Board of Public Charities may possibly be able to aid them in the matter, by providing a specialist, or otherwise.

IN THE MATTER OF THE REGULATION OF THE CROSSING OF FACILITIES OF ONE PUBLIC SERVICE COMPANY BY THOSE OF ANOTHER PUBLIC SERVICE COMPANY.

Public Service Commission. General Order No. 11. (*Superseding General Order No. 2.*)

BY THE COMMISSION.

And now, August 5, 1914, until otherwise hereafter determined and ordered, any public service company, subject to the provisions of The Public Service Company Law, approved July 26, 1913, before constructing any structures or other facilities across the structures or other facilities of any other public service company, whether under ground, or above ground, or at the same or different levels, shall serve ten days' (or shorter notice, if specially allowed by the Commission, upon sufficient cause being shown) written notice upon the

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public service company or companies whose structures it is so desired to cross, which notice shall specify the nature and character, way and manner, of such contemplated crossing, and the exact location thereof, and shall file with the Commission a true copy of the notice so served, with proof of service thereof; provided, however, that if an agreement which shall specify the nature and character, way and manner, of the construction of the proposed crossing be in force between the public service company proposing to cross and the public service company whose structures or facilities it is proposed to cross, it shall be sufficient if the above notice, served and filed, with proof of such service, with the Commission, as aforesaid, shall state the exact location of such crossing, and that the same will be constructed in accordance with said agreement and specifications referred to therein, a true copy of the said agreement and specifications being also filed with the Commission together with said notice.

The public service company or companies desiring to construct such crossing may, after the termination of the period of said notice, proceed therewith, in accordance with the specifications as stated or referred to in said notice, as above provided, unless, within the period of said notice, served as aforesaid, the public service company or companies affected by such crossing shall serve upon the company or companies proposing to make such crossing, and file with the Commission, a protest against the construction of the same, or unless, without such protest, the Commission, within the period of said notice, filed with it as aforesaid, shall, of its own motion, direct that the crossing shall not be proceeded with.

Such protest shall set forth the reasons which, in the judgment of the protestant, show that the Commission should not approve such crossing, and proof of service thereof, as aforesaid, shall be filed with the Commission within three days of the filing of the protest with the Commission.

The Commission, upon consideration of such notice or protest, or both, may fix a time and place for hearing, after due notice, and determine whether or not such crossing shall be approved. This regulation shall apply to all such crossings between the structures or facilities of any public service company and the structures or facilities of any other public service company, other than crossings between railroads and street railways, and shall be subject to the specific regulations that may hereafter be adopted by the Commission.

Stouffer *vs.* Chambersburg, Greencastle & Waynesboro St. Railway Co.

This order supersedes General Order No. 2 upon the same subject.

EDWIN D. STOFFER *vs.* CHAMBERSBURG, GREENCASTLE & WAYNESBORO STREET RAILWAY COMPANY.

Public Service Commission—Complaints.

Complaints made to the Public Service Commission should be verified by affidavit, as required by The Public Service Company Law and the rules of practice of The Public Service Commission.

Public Service Commission. No. 28 Complaint Docket.

WRIGHT, Commissioner, July 23, 1914.

This complaint alleging excessive and discriminatory rate of fare and inadequate service between Greencastle and Waynesboro is in the form of letters written at different times by the complainant. The allegations contained in said letters are not verified by affidavit of the complainant, as required by The Public Service Company Law and Rules of Practice of the Commission. Copies of all said letters were sent to the respondent company for answer, which answer contained a detailed report of the number of passengers carried on the cars, the overcrowded condition of which is complained of, during the year 1913, and a statement with respect to the fare zones and rates charged by the company.

On February 26, 1914, a representative of the Commission made an investigation of the alleged crowded condition of the cars in question, and filed his report under date of March 3, 1914. A hearing on this complaint was fixed for July 21, 1914, and the complainant and respondent advised of said hearing. Under date of July 15, 1914, the complainant replied to the Commission's notice of the said hearing as follows:

"I beg leave to state that I do not expect to be present either personally or by counsel at the hearing of the case on July 21st. * * * I believe the ground has been thoroughly covered in my letters."

In view of the above facts that the allegations contained in the letters of the complainant are not verified by proper affidavit, the complainant refusing to make such affidavit, and his failure to appear at the hearing to substantiate by proper evidence the allegations contained in said letters, as well the re-

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port of the investigator of the Commission, the Commission is of the opinion that the complaint should be dismissed, and the respondent company advised by the secretary to use all possible care and diligence to prevent overcrowding of the cars in question.

ORDER.

The case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, to wit, July 23, 1914, it is ordered: That the petition in this case be and is hereby dismissed, and the secretary directed to advise the respondent company as determined in said report.

IN RE PETITION OF THE CITY OF PITTSTON FOR THE APPROVAL OF A STREET LIGHTING CONTRACT WITH THE CITIZENS' ELECTRIC ILLUMINATING COMPANY.

Municipalities—Contracts—Discretion of municipal authorities.

Whether a contract for lighting the streets of a city has been awarded to the lowest responsible bidder is a question for the courts, rather than the Public Service Commission.

Municipal authorities, in purchasing supplies or awarding contracts, are required by statute to follow certain general methods and they are expected and allowed to exercise reasonable discretion in deciding upon the final action to be taken.

Public Service Commission. No. 103 Municipal Contract Document.

For NE, Commissioner, July 21, 1914.

The city of Pittston, on January 10, 1914, filed a petition with the Public Service Commission, asking for the approval of a contract entered into December 31, 1913, with the Citizens' Electric Illuminating Company, for the lighting of the streets of Pittston, which petition states that in accordance with the provisions of an ordinance duly enacted by council

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December 8, 1913, and approved by the mayor December 11, 1913, proposals for said street lighting were duly advertised for, received, opened and acted upon by council, and the contract awarded to the Citizens' Electric Illuminating Company.

Following the presentation of said petition to the Commission, a protest against the issue of a certificate of Public Convenience approving said contract, was filed by the Consumers' Electric Company of the city of Pittston, Luzerne County, Penna.

In this it was set up, * * * that the said protestant is a corporation organized under the laws of the State of Pennsylvania, for the purposes of supplying and furnishing light, heat and power by means of electricity to the public in the city of Pittston; * * * that the city of Pittston is a city of third class and subject to the provisions of the Commission form of government law, approved June 27, 1913; * * * that the contract for street lighting entered into December 31, 1913, by the city of Pittston with the Citizens' Electric Illuminating Company is based upon an ordinance and specifications which limited and confined the bidding to one type of lamp manufactured, owned and controlled by one company, and which ordinance discriminated arbitrarily and unreasonably in favor of the Citizens' Electric Illuminating Company, the only company at that time having a plant, poles and wires erected in said city, by providing on the eve of winter, that only four months' time be given the successful bidder to make the necessary installation; * * * that the bids received for the street lighting per lamp per year for five and ten year terms respectively were as follows:

Citizens' Electric Illuminating Company:

For arc lamps, ...5 yr. term, \$55.00—10 yr. term, \$50.00

For incandescent or

tungsten lamps, .5 yr. term, \$16.00—10 yr. term, \$15.00

Pittston City Electric Company:

For arc lamps, ...5 yr. term, \$57.00—10 yr. term, \$52.00

For incandescent or

tungsten lamps, .5 yr. term, \$16.50—10 yr. term, \$15.50

Consumers' Electric Company of Pittston:

For arc lamps, ...5 yr. term, \$48.50—10 yr. term, \$46.50

For incandescent

lamps, ...5 yr. term, \$15.00—10 yr. term, \$14.75

For tungsten lamps, .5 yr. term, \$15.50—10 yr. term, \$15.00

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* * * that the Pittston City Electric Company is owned and controlled by the Citizens' Electric Illuminating Company, so that in reality there were but two bidders for said contract, and within a few minutes after said contract was awarded, it was executed by both the parties thereto; * * * that the protestant was the lowest responsible bidder, complied with all the requirements in connection with submitting proposals, was and is ready and willing to furnish and provide the public lighting for said city on the terms and for the prices set forth in its bid, notwithstanding the unreasonable and discriminatory conditions attached to said ordinance and intended to favor the General Electric Company as to type of lamp, and the Citizens' Electric Illuminating Company as to the contract; * * * that by reason of the short space of time provided in the specifications for the successful bidder to make the necessary installation, less bids were received than would have otherwise been submitted, and as a result the inhabitants and taxpayers of the city were deprived of the benefits of honest and fair competition favored by laws; * * * that the awarding of the contract to the Citizens' Electric Illuminating Company at the prices set forth, imposed an additional pecuniary burden on the taxpayers of said city, is antagonistic to the best interests of the public, and unfair and unjust to the protestant, as a responsible competitive bidder for the contract; * * * that the approval of said contract is not necessary or proper for the service, accommodation, convenience or safety of the public, and would be contrary to the spirit of fair dealing and The Public Service Company Law; * * * that therefore the protestant objects to such approval, and asks that for the reasons given, the approval be withheld and refused.

The said ordinance of December 11, 1913, provided that the city clerk was authorized and directed to advertise for sealed proposals, in accordance with the ordinance and specifications, for a contract period of five and ten years; that the proposals should cover the entire lighting, naming separate prices for arc and incandescent lights; that all proposals be submitted to the city clerk in open council meeting at a time to be fixed by council; that the city reserves the right to reject any and all bids; that council may award the contract; that the mayor shall execute the contract, attested by the city clerk and the corporate seal of the city; that if the corporation awarded the contract is not in a position to immediately light

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the streets of the city, it is granted four months from the date of the contract becoming effective, to make the necessary installation.

The contract provides that the Citizens' Electric Illuminating Company, for a term of ten years from January 1, 1914, shall furnish for lighting the streets of the city, 126 arc lamps of a type known as Series Luminous or Magnetite operated in series on a four ampere circuit, and to be adjusted for four amperes with a voltage of approximately seventy-five to eighty and an average wattage of 310 at the terminals; of a type similar to and giving equally as good illumination as lamps now operated in Jenkins Township and West Pittston Borough, and located and suspended similarly to the present lamps; and also furnish 154 series 32-candle power tungsten lamps located and suspended similarly to the present lamps; and any additional arc or tungsten lamps required by the city; all lamps to be lighted all night and every night; that the city shall pay the company for said lighting at the rate of \$50.00 per lamp per year for arc lamps, and \$15.00 per lamp per year for tungsten lamps, less certain ratable deductions to be made whenever any lamp or lamps are not burning for certain times; that the company shall furnish current free of charge to the city, for lighting its city hall, city offices, stable and engine room of the fire department, and allow the city free use of poles for the purpose of stringing wires for fire alarm and police service.

The evidence shows that in accordance with the ordinance of December 11, 1913, authorizing the same, the city clerk duly advertised for proposals for street lighting to be submitted to council on December 22, 1913. By reason of the fact that a bill in equity was then pending in the court of Luzerne County, praying an injunction to restrain the city from awarding the said contract, the bids were not opened until December 31, 1913, after said court had refused the injunction applied for in said case, and council then awarded the contract to the Citizens' Electric Illuminating Company, and the proper officers of the city executed the same.

The same counsel who represented one James A. Joyce, the complainant in the above-mentioned equity proceeding in which the injunction was refused, also represented the company protesting to this Commission against the issuing of the Certificate of Public Convenience approving the contract, which was

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awarded by the city of Pittston to the Citizens' Electric Illuminating Company. The grounds of the protest against our approving the contract are substantially the same as were urged upon the court for the granting of the injunction, and the testimony in support of the protest is also substantially the same, and all goes to the purely legal question as to whether the contract was awarded to the lowest responsible bidder within the meaning of legislation relating to advertisement and competitive bidding upon municipal contracts. That is a question rather for the courts than for the Commission to decide in connection with an application for a Certificate of Public Convenience, under The Public Service Company Law of July 26, 1913. In the decided case above mentioned, the Court of Luzerne County has already passed upon such question, reaching a conclusion adverse to the contention of the present protestant in the case before us.

Conflicting testimony was given as to the relation between the Citizens' Electric Illuminating Company and the Pittston City Electric Company.

Conflicting testimony was also given as to the length of time required "to make necessary installation," which the specifications provided was to be four months, and the protestant stating that it "was and is ready and willing to furnish and provide the public lighting for said city on the terms and for the prices set forth in its bid, notwithstanding the unreasonable and discriminatory conditions attached to said ordinance and intended to favor the General Electric Company as to type of lamp, and the said Citizens' Electric Illuminating Company as to the street lighting contract;" and yet at the hearing before the Commission the protestant introduced evidence to the effect that no "reasonable or sane man would undertake to erect a plant such as that contemplated in these specifications and contract inside of four months;" not "tie himself down to the contract;" nor "tackle it if he ever had any experience with doing it before."

Municipal authorities in the purchasing of supplies or awarding of contracts, are required by statute to follow certain general methods of procedure; and they are expected and allowed to reasonably exercise discretionary powers in deciding upon the final actions to be taken. When determining matters that require public notice, consideration in open regular meetings, and if competition be involved, the certainty of unsuc-

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cessful bidders calling attention to the actions taken, such municipal authorities will act only after giving due consideration to the many circumstances surrounding each case, and in their judgment for the best interests of the municipality.

Preliminary to awarding a contract for the lighting of the streets of Pittston, its council had to consider, * * * the effect that the length of term of contract would have upon the price for lights; * * * what type and distribution of lamp in its community would prove most satisfactory; * * * what time should be fixed for receiving, opening and acting upon proposals; * * * should any contract be awarded to a company without a plant in operation; if so, could light be secured and how, from date of the award of the contract until a new company be prepared to render service, and how long time should be fixed for the installation of a new plant; * * * how much difference would be justifiable in prices between a company having an operating plant and a company without such a plant; * * * and if a new company be awarded the contract, what advantages would result and what would be the probability of continued competition; * * * etc.

The council of Pittston evidently considered the various phases of the question before it, as is shown by its ordinances and by the testimony at the hearing, and it is entitled to reasonable discretion in reaching its decision.

In the contract under consideration, the type of lamp specified will give satisfactory service, and is one of several types of modern lamps that are in general use and giving satisfactory service in many cities; the prices named are reasonable, although not the lowest of the proposals received; the service will be continuous; the proceedings of council were open and public, and we think that the discretion vested in council and mayor were exercised in a reasonable manner in awarding and executing the said contract.

Testimony was given that the Citizens' Electric Illuminating Company had been operating in Pittston since 1898; that there were never any complaints as to the character of the service rendered or the rates charged by it; that it had been furnishing current to light the streets for many years, and since the expiration of its last contract therefor in August, 1911, without any formal contract; that the specifications were prepared by K. J. Ross, president of the company now furnishing the light, and submitted by him to council; but no evidence was pre-

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sented to show that the type of lamp specified by the city is improper or will not prove satisfactory.

It is therefore the opinion of the Commission that the approval of the contract is necessary and proper for the service, accommodation, convenience and safety of the public, and a Certificate of Public Convenience will issue accordingly.

ORDER.

This case being at issue upon petition and protest, on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of facts and conclusions, which said report is hereby referred to and made a part hereof.

Now, to wit, July 21, 1914, it is ordered: That a Certificate of Public Convenience be issued evidencing the Commission's approval of the contract between the city of Pittston and the Citizens' Electric Illuminating Company for the lighting of the streets of said city for a period of ten years.

PITTSBURGH STEEL COMPANY vs. PITTSBURGH AND LAKE ERIE
RAILROAD COMPANY.

Railroads—Joint rates—Cancellation—Apportionment.

The Public Service Commission has jurisdiction to determine the apportionment of a joint freight rate between two carriers, and pending such determination the cancellation of an admittedly reasonable rate will not be permitted.

Public Service Commission. No. 194 Complaint Docket.

TONE, Commissioner, August 5, 1914.

The Pittsburgh Steel Company complained in this case of the withdrawal or cancellation by the Pennsylvania Railroad Company of the joint rate of 75 cents per ton of 2,240 pounds for the transportation of crude fluxing limestone from Union Furnace, Pa., and points adjacent thereto on the Pennsylvania Railroad, to Monessen, Pa., on the Pittsburgh and Lake Erie Railroad, by Supplement No. 5, to Pennsylvania Railroad Company's tariff P. P., P. S. C. Pa. No. 2, resulting in the com-

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plainants being compelled to pay for the said transportation to which the said joint rate previously applied a combination of separate rates charged respectively by the Pennsylvania Railroad Company and the Pittsburgh and Lake Erie Railroad Company, between the points in question, which in amount was largely in excess of the joint rate cancelled.

At the hearing held by the Commission upon this specific complaint, which hearing was attended by the complainants and the Pennsylvania Railroad Company and the Pittsburgh and Lake Erie Railroad Company, respondents, the evidence submitted fully sustained the above allegations of the complaint. From this evidence it appeared that the said rate of 75 cents per ton was put into effect by the Pennsylvania Railroad Company after negotiations with the complainant, and the respondents conceded that it was a reasonable, joint rate. It further appeared that the joint rate so established was afterwards cancelled by the Pennsylvania Railroad Company solely by reason of the fact that it and the other participating carrier, viz: the Pittsburgh and Lake Erie Railroad Company, had failed to agree as to the proper division of the joint rate that should be made between them. A large amount of testimony was presented by the two respondent carriers relative to this controversy over the division which had arisen between them, and it was submitted to the Commission as the basis upon which the Commission might, under the provisions of The Public Service Company Law, determine what the equitable and proper adjustment of the division of the joint rate, as between said respondents, ought to be. The respondents offered no testimony, however, to justify the cancellation of the joint rate and the resultant increase in the charge for the transportation to the complainant occasioned thereby, other than the fact of said disagreement between the respondents.

Provision having been made by the statute for the settlement and adjustment by this Commission of such disagreement, it is the judgment of the Commission that, pending such determination, the cancellation of the concededly reasonable joint rate, to the detriment of the complainant, was not warranted, and that such joint rate should, accordingly, be forthwith restored, irrespective of the merits of the controversy as to the division of the same, and it will be so ordered—adjustment to be made with complainant upon the basis of said 75-cent rate as if it had not been cancelled.

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After careful consideration of the testimony submitted by both respondents with regard to the fair, just and reasonable division of the said joint rate between themselves, it is the judgment of the Commission that the just and reasonable proportion to which the Pittsburgh and Lake Erie Railroad Company is entitled is 25 per cent., or $18\frac{3}{4}$ cents, and that to which the Pennsylvania Railroad Company is entitled is 75 per cent., or $56\frac{1}{4}$ cents, per ton of 2,240 pounds, and it will be so determined and ordered, to take effect from the date of the establishment of the joint rate.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, submitted and filed of record a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof.

Now, to wit, August 5, 1914, it is ordered: That the joint rate of 75 cents per ton of 2,240 pounds for the transportation of crude fluxing limestone, in car loads, from Union Furnace, Pa., and points adjacent thereto on the Pennsylvania Railroad, to Monessen, Pa., on the Pittsburgh and Lake Erie Railroad, which were withdrawn by Supplement No. 5, to Pa. R. R. P. F., P. S. C. Pa. No. 2, effective April 1, 1914, be forthwith restored and put into full force and effect.

And it is further determined from the record in this case and hereby ordered, that the reasonable proportion of said joint rate to which the Pittsburgh and Lake Erie Railroad Company is entitled from the date said joint rate was originally made effective, is 25 per cent. thereof, or $18\frac{3}{4}$ cents, and that to which the Pennsylvania Railroad Company is entitled from said date is 75 per cent. thereof, or $56\frac{1}{4}$ cents, and that division of said joint rate shall be made by said companies from said date according to the proportions herein fixed and determined.

JAMES B. BONNER v/s. BELL TELEPHONE COMPANY OF PENNSYLVANIA.

Telephone companies—Local exchanges—Subscribers.

The general rule of telephone service is that each subscriber is connected with the local exchange in the territory in which he resides, and for communications with persons living in other exchanges, a toll is charged.

A subscriber for telephone service is entitled to adequate service at reasonable rates. When these conditions are fulfilled, he has no right to demand that he be connected with any particular switchboard.

Public Service Commission. No. 94.

PENNYPACKER, Commissioner, May 6, 1914.

The complainant presented no evidence at the hearing of the above case, March 26, 1914. From the petition and answer on file, and the testimony given on behalf of the respondent, the following facts are found:

Oak Lane and Melrose constitute a suburban community whose residents in the main have relations with Philadelphia. Melrose is in Montgomery County, and Oak Lane is in the city of Philadelphia. Each of them, under the arrangements made by the respondent corporation, constitutes a separate local telephone exchange; a switchboard for each of these exchanges is established and maintained in the same building in Melrose. The general rule of telephone service is that each subscriber is connected with the local exchange in the territory in which he resides, and for communication with persons living in other exchanges, a toll is charged.

For a number of years—at least five—the respondent made an exception to this rule in the case of the residents of Melrose, and permitted them to be connected directly with the Oak Lane exchange upon the payment of sixty (60) dollars and mileage depending upon the number of miles between their residences and the center in Philadelphia. The respondent has found this exceptional service to result in trouble and inconvenience, and to be an interference with the regular and approved method of conducting the business, and has recently sought to limit the exception, looking forward to its entire cessation.

The complainant, who lives in Melrose, about four squares from the line between Montgomery County and Philadelphia,

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and who has made his residence there at a comparatively recent date, asked to have connections direct with the Oak Lane switchboard upon the mileage basis, which would enable him to connect directly with Philadelphia, where are the most of his correspondents. The respondent required him to connect with the Melrose exchange, paying thirty-six (\$36) dollars, and to pay a toll of five cents upon each Philadelphia message. Upon his insistence, however, the respondent offered to connect him directly with the Oak Lane exchange, provided he should first be connected with the Melrose exchange. This suggestion, if carried into effect, would necessitate the placing of two telephone instruments in his house.

The substance of the complaint is that "the Bell Telephone Company has refused to install in the residence occupied by your petitioner at Melrose, a telephone to be connected with the said exchange building situate in Melrose, with an Oak Lane number, for the sum or price of sixty (\$60) dollars per year, for unlimited service in any part of Philadelphia, unless your petitioner agrees to install an additional instrument in his residence, connected with a separate set of wires to the same telephone exchange building, but to be given a Melrose number, at a cost of thirty-six (\$36) dollars per year."

The controversy between the parties in the present case seems to have arisen over immaterial issues. It is the duty of the respondent to furnish adequate telephone service at reasonable rates, and the complainant is entitled to demand such service, and to be brought into communication with his correspondents in Philadelphia and elsewhere. Provided he is enabled to secure such service, he has no right to demand that he be connected with any particular switchboard. Nor is it at all material that two switchboards are maintained in close proximity in the same house. Obviously, it is more convenient as a general proposition, that the local switchboard should be somewhere in the territory of the local exchange, and this is a convenience which alone concerns the respondent.

If the complainant, by connection with the Melrose exchange and the payment of thirty-six (\$36) dollars, is enabled to communicate with his Melrose neighbors, and by the payment of five cent tolls, to communicate with his Philadelphia and other correspondents—and these charges are reasonable—he receives all which he can properly claim.

That the most effective way of conducting the telephone

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business is to divide the territory into local exchanges or zones, in which the interests of the people are interrelated, has been proven by experience, and the system has met the approval of competent authority. Ordinarily the lines dividing these exchanges or zones are determined by the telephone companies, and are the outcome of experience. Necessarily, if such a system be adopted, there will often be neighbors living near each other on opposite sides of the line, whose relation to the telephone service differ. If the lines of the exchanges or zones are so arranged as to include or exclude territory in such a way as to affect disadvantageously and unreasonably the service to the public, such a determination of them can be supervised and corrected by this Commission, but there is no allegation to that effect in the petition, and no evidence to support the conclusion. Nor is there any allegation in the petition, or any proof offered that a charge of thirty-six (\$36) dollars for connection with the Melrose exchange, or of five cent toll for each message to Philadelphia is exorbitant or unreasonable. These difficulties, if they exist, can be considered by the Commission, should they be properly presented. The complaint ought, therefore, to be dismissed.

ORDER.

And now, to wit, May 13, 1914, the finding, determination and opinion of Commissioner Pennypacker is concurred in and made the finding, determination and opinion of the Commission, and it is accordingly ordered that the complaint in this case be and the same hereby dismissed.

SOMERSET TELEPHONE COMPANY *vs.* ECONOMY TELEPHONE STOCK COMPANY.

Telephone companies—Stockholders—Rates—Discrimination.

Under the Public Service Company Law, a telephone company cannot legally give lower rates to stockholders than to other subscribers or maintain free service at hotels or railway stations.

Public Service Commission. No. 124.

BRECHT, Commissioner, June 3, 1914.

In the matter of the Somerset Telephone Company *vs.* the

Somerset Telephone Company vs. Economy Telephone Stock Company. Economy Telephone Stock Company, the record shows that it is the practice of the Economy Stock Company to charge patrons who hold stock in the said company two dollars less per annum for their service than subscribers who are not stockholders for the concern.

This action respondent attempts to justify on the ground that it builds new lines and furnishes telephone service in new territory only after a subscriber takes stock, and therefore such a concession is found to be a necessary inducement, in order that the business of the company may be further developed and extended. Under the plan adopted respondent contends that the "stockholding subscriber really builds the line because he furnishes money to pay for the labor and material of putting up the line," and consequently because of the larger risk taken by the stockholding subscriber, he should receive some consideration in the rates he is charged.

This argument, in substance, applies to any stock telephone company and could be urged with equal propriety as a sufficient reason for making a difference in the rates which any such company charges its patrons. In all incorporated telephone companies, stock must be subscribed before a line can be built or before there can be any development of the plant equipment, and whether the money comes from a subscriber who expects to use the service, or from an outsider, does not change the status of the company as a public service company required by law to furnish service at rates which shall not be unreasonably discriminatory, or make any difference in the scope of its powers under the law.

It is intended that the law shall apply in the matter of rates for service rendered to stockholders and non-stockholders without distinction, and, therefore, to grant a lower rate to subscribers holding stock than is granted to persons not holding stock must be regarded as a discrimination. Moreover, the effect of granting special rates to stockholding subscribers would lead to all kinds of abuse in the matter of profits and dividends stockholders might receive.

In like manner, under the facts disclosed by the evidence in this case, the policy of respondent company, of furnishing and maintaining telephone service at hotels, or railway stations, free, is an unreasonable discrimination as against other patrons and users of the service of respondent.

In both of these instances, the method pursued by the re-

Somerset Telephone Company *vs.* Economy Telephone Stock Company. spondent company is a violation of sub-section (a) and (b) in Section 8 of Article III, of the Public Service Company Law.

The Commission therefore determines that respondent should make no difference in the rates which it charges stockholding and non-stockholding subscribers, or users of its service, and that such discriminatory practice should be discontinued, as should also the practice of furnishing and maintaining telephone service free at hotels and railway stations. An order should be entered accordingly.

ORDER.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

Now, to wit, June 3, 1914, it is ordered, that the Economy Telephone Stock Company, on and after the receipt of this order, make no difference in the rates which it charges stockholding and non-stockholding subscribers, or users of its service, and that the practice of furnishing and maintaining telephone service free at hotels and railway stations be discontinued.

RESIDENTS OF ANTRIM TOWNSHIP, FRANKLIN COUNTY, *vs.* CUMBERLAND VALLEY RAILROAD COMPANY.

Railroads—Freight and passenger service.

When receipts from passenger traffic, at a given station, are not sufficient to meet the expense of maintaining a ticket office, the passenger service may be discontinued.

The Commission will not approve a plan for stopping trains for passengers, at a station where no passenger agency is maintained, which practically puts the traveling public in control of the trains.

It cannot be considered unfair to require a railroad company to assume an annual expense of about \$200 to protect a freight business of \$5,000 a year, or upwards, especially when the continuance of such business is of material interest to the community in which it exists.

Public Service Commission. No. 138.

Residents of Antrim Township *vs.* Cumberland Valley Railroad Co.

BRECHT, Commissioner, July 3, 1914.

In the matter of the discontinuance of the station at Kauffman, Franklin County, the petitioners contend that they have found it very inconvenient in shipping freight since Kauffman station, on the Cumberland Valley Railroad, was changed from an agency station for freight and passenger traffic to a non-agency station for freight only, and now petition that respondent be required to place an agent in charge of the freight business at that point, and that the said station be made a flag stop for at least several passenger trains to points east of Chambersburg and west of Greencastle.

Kauffman is a small village located on the Cumberland Valley Railroad between Chambersburg and Greencastle, about eight miles from the former and three miles from the latter place. It is also connected with Chambersburg and Greencastle by a trolley line that runs practically parallel to the Cumberland Valley Railroad the entire distance.

The village of Kauffman contains twenty-five houses and has a farming population within a radius of a mile from it of about one hundred and fifty to two hundred people. Prior to December 15, 1913, it was a passenger and freight station regularly in charge of an agent for a period of twenty-six years or more. During that time the said station was a flag stop for eight of the fourteen trains operated by the Cumberland Valley Railroad Company over its lines. It also maintained an express office and had a resident freight agent who took charge of all freight shipments to or from that point.

On December 15, 1913, Kauffman was discontinued as an agency station both for freight and passenger business, and since then has been continued wholly as a non-agency freight station. All inbound freight to the said station must now be prepaid and outbound freight must be billed through the agent at Greencastle, to whom the shipper can send his directions over the telephone of the Railroad Company free of charge.

The nearest passenger station now at Kauffman and vicinity is at Marion, which is two and one-half miles by public road and about two miles by trolley from Kauffman. The station at Marion is within comparatively easy reach of most of the complainants since some of them live as near to it as to the former station at Kauffman, while the greater number of them can reach Marion in a few minutes by means of the trolley line.

There are two trains on the main line, and four on the South

Residents of Antrim Township *vs.* Cumberland Valley Railroad Co. Penn Branch, east bound, that stop daily at Marion, to take on and let off passengers; and in addition to these six trains there are three more main line trains east bound, that stop to let off passengers. The west bound traffic has about the same number of trains available daily. Persons from Kauffman can also take trains at Chambersburg for points east, and at Greencastle for points west by trolley, which makes comparatively close connection with a number of trains each way.

From facts submitted at the hearing it appears that the trolley line between Chambersburg and Greencastle has largely absorbed the passenger traffic between these towns and of all places lying intermediate. This is particularly true of Kauffman where the passenger receipts were gradually growing less until in the last few years the station was kept open, the earnings per month did not pay the cost of stopping one of the heavy trains used in that service.

In 1907 when the trolley road from Chambersburg to Greencastle was built the ticket receipts at Kauffman were \$1,647.67, a monthly average of \$137.50, of which the Cumberland Valley Railroad Company's share was \$129.99; in 1911 the receipts showed a monthly average for the Cumberland Valley Railroad Company of \$44.71; in 1912 the average was \$40.81; in 1913 to December 15th, the monthly average was \$37.02. It is contended that the cost each time of stopping one of the heavy trains used on that road is from seventy-five cents to one dollar and twenty-five cents.

The complainants concede that the earnings for passenger traffic are not sufficient to employ a ticket agent at Kauffman, and therefore they "do not insist that the station shall be maintained for purposes of local traffic." Their needs are answered if certain main line trains stop on signal at that point to take on passengers for points east of Chambersburg and west of Greencastle. For the purpose of stopping such trains complainants contend, a passenger agent would not be needed, and the respondent would therefore not be put to any expense to furnish the desired accommodation.

The method suggested could not be defended as a safe rule to follow in practice. Any arrangement to stop some trains and not others without some one responsible in charge to supervise the work, would lead to confusion and trouble in the service. The traveling public would be given control of the signals and it would naturally follow that wrong trains would be

Residents of Antrim Township *vs.* Cumberland Valley Railroad Co. stopped and boarded, either through error or for the purpose of making better time. It would result in practically placing the operation of trains at the aforesaid station in the hands of the general public and tend to produce a situation that would sooner or later become intolerable.

The plan proposed by complainants to secure certain trains for the passenger traffic makes no provision for express service, and seems to indicate that the removal of the express office from Kauffman did not prove of any great inconvenience to the people of that community. This apparent satisfaction with respect to express facilities may be accounted for by the fact that the trolley company has been regularly carrying express for that vicinity and may have given convenient and satisfactory service. Furthermore, there is an express office at Marion which has shipping connections with several of the trains east and west bound at different hours of the day.

Freight is now received at Kauffman in carload and less than carload lots. Less than carload shipments are placed by the crew in the warehouse, and carload shipments are "loaded or unloaded from the cars direct by the shipper or consignee." Inbound freight must be prepaid and outbound freight is billed through the agent at Greencastle. Notice of the arrival of freight at Kauffman is received by telephone or mail from the agent at Greencastle.

The complainants testified that they have found it very inconvenient to ship freight under the present arrangement; that there is a necessary delay in some instances when freight must be shipped prepaid; that it is not safe to receive anything that may be injured by the weather; that valuable freight is liable to damage since there is no one held responsible to receive it and protect it from injury or abuse; and that there are frequent delays in receiving notice of the arrival of the shipment.

The station building at Kauffman is owned by the Cumberland Valley Railroad Company and is now leased to a general storekeeper, who, in consideration of the lease, locks the warehouse at night and opens it in the morning and furnishes the scales for weighing outbound freight and may offer such other freight facilities as he may care to render. But the storekeeper is not employed by the railroad company, nor does he receive any kind of compensation from the respondent, nor does he exercise any supervision or control over the freight business.

The evidence of the general freight agent of the Cumberland

Residents of Antrim Township vs. Cumberland Valley Railroad Co.

Valley Railroad contained the statement that the gross receipts from the freight business at Kauffman for one month were \$378.08, and for another month \$629.74, making an average of about \$5,000.00 a year. There were no figures submitted showing that the freight receipts were growing less in recent years; but it was shown that the volume of freight business handled was substantially the same when the agency was abolished at Kauffman as in 1904, nine years before. The agency station therefore was discontinued not because the freight receipts were diminishing at that point nor because the freight business proved to be the source of any additional expense in maintaining the station.

The principal item of expense sustained by the railroad company in maintaining an agency station at Kauffman was the salary paid to the agent amounted, as salary and compensation, to \$26.80 a month for his services as passenger, express, and freight agent. The other items of expense necessary for the upkeep of the station, such as the cost of providing and maintaining safety lamps and switch lights, are the same now as heretofore. The general expense of keeping up the property and the interest on the investment are of course substantially the same whether a place be maintained as an agency or non-agency station.

The record in this proceeding shows that the passenger receipts were falling off for some years and were gradually reaching a point when they were no longer regarded as sufficient to meet the cost of maintaining a ticket office. Under these circumstances it is not difficult to understand why the ticket office was closed, and the agency for passenger service discontinued; but it is not equally clear why the freight business, which had been fully holding its own and showing no signs of becoming less in volume, should be impaired in its local service when that change was made.

The method of handling a freight business of \$5,000 a year, especially where the method has been established for many years, should not be discontinued except for sufficient cause. Such a change should not be made merely to lessen the operating expenses of the carrier nor for the purpose of concentrating the business. Nor should it be discontinued because it was found necessary for lack of passenger receipts to close the ticket office and discontinue the passenger traffic at a station. It should appear that it had to be done because the receipts

Residents of Antrim Township *vs.* Cumberland Valley Railroad Co. from the freight department were growing less or the expenses for maintaining the freight service were becoming greater. As a matter of fact neither of these things took place in the freight business at Kauffman.

Under the conditions as they now exist at Kauffman station it is reasonable to conclude that a freight agency could be maintained at that place at a nominal expense. The warehouse is leased to a party who was formerly agent at Kauffman and who is now occupying the building to conduct a general store. In view of his business relations with the railroad company, arrangements could be made with the storekeeper to take charge of the freight business for a comparatively small compensation, perhaps not exceeding fifteen dollars a month, or at least not for more than a proportional share of \$26.80, the amount formerly paid to the agent when he had charge of both the freight and passenger business.

It cannot be considered as unfair or unsound as a business proposition to ask the railroad company to assume an expense of about two hundred dollars per year for the purpose of protecting a business whose gross earnings amount to \$5,000 and upwards per annum. This is true more especially when such a small cost will establish a service which the community interested contends justly belongs to it and which it is seeking to have restored to it.

I am, therefore, of the opinion that a freight agency should be continued at Kauffman, and recommend that same be re-established by respondent on or before July 15, 1914; and am further of the opinion that the request of the petitioners for certain passenger train service at Kauffman should be refused, and accordingly recommend that the petition for the said passenger service be dismissed.

ORDER.

The Commission concurs in the foregoing finding, determination and opinion of Commissioner Brecht, and it is accordingly ordered that the freight agency be continued at Kauffman, and that such agency be established by the respondent on or before July 15, 1914; and it is further ordered that the application for the furnishing of passenger service at Kauffman be and the same hereby is dismissed.

COMMONWEALTH, EX RELATIONE MICHAEL E. STROUP, DISTRICT ATTORNEY, vs. ISAAC S. HOFFMAN, SAMUEL S. MILLER, JOHN H. EBY, COMMISSIONERS OF DAUPHIN COUNTY; ARTHUR H. BAILEY, COUNTY TREASURER; CHARLES L. BOYER, THOMAS S. MANNING AND HARRY A. WALTERS, DIRECTORS OF THE POOR, AND LANE S. HART, HENRY CORDES, B. FRANK OBER, JOHN HARGEST, W. B. MEETCH AND JOHN H. MCILHENNY, INSPECTORS OF THE DAUPHIN COUNTY PRISON.

County auditors—Act of March 27, 1913.

Under the Act of March 27, 1913, P. L. 10, establishing the office of county controller and abolishing the office of county auditors in counties having over one hundred thousand inhabitants, county auditors in office at the time of the passage of the act are entitled to serve out the terms for which they were elected and perform the duties required by law.

Mandamus. C. P. Dauphin County, No. 739 January Term, 1914.

Frank B. Wickersham and *Oscar G. Wickersham*, for relators.

Frederick M. Ott, County Solicitor, for respondents.

KUNKEL, P. J., July 15, 1914:

This case comes before us on a demurrer to the return filed to the alternative writ of mandamus. It appears that John W. Cassel and Francis W. Riegle were elected auditors of the County of Dauphin in November, 1911, for a term of four years beginning the first Monday of January, 1912. They took the oath of office and entered upon their duties and performed the same during the year 1912. They made demand upon the defendants for their respective vouchers and accounts for the year 1913 for audit, settlement and adjustment as required by law, with which demand the defendants refused to comply on the ground that the office of county auditor had been abolished by the Act of March 27, 1913, P. L. 10. The question presented is whether such office was abolished so as to exclude therefrom those who were in office at the time the act was passed.

The Act of June 27, 1895, P. L. 403, established the office of county controller in counties containing one hundred and

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fifty thousand inhabitants and over, prescribed his duties, and directed that a county controller should be elected in place of county auditors for a term of three years. Sections 1 and 16 of that act were amended by the Act of May 8, 1901, P. L. 140, so as to make it apply to all counties containing one hundred and fifty thousand inhabitants. The Act of March 27, 1913, P. L. 10, is an amendment of Section 1, as amended by the Act of May 8, 1901, its purpose as stated in the title being to provide for the office of controller in all counties having over one hundred thousand inhabitants. It declares that "the office of county controller is hereby established, and the office of county auditor or auditors abolished, in each county of this Commonwealth which shall contain by any federal census one hundred thousand inhabitants or over," and directs that "at the municipal election in the year one thousand nine hundred and thirteen the qualified electors of each such county, not now having a controller, shall elect one citizen of such county to serve as controller, in place of county auditor or auditors, until the first Monday of January, one thousand nine hundred and sixteen." Thus the effect of the Act of 1913 was to bring within the provisions of the Act of 1895, as amended in 1901, certain counties other than those which were theretofore covered by it, among which was the County of Dauphin. In *Lloyd vs. Smith, et al.*, 176 Pa. 213, the Act of 1895 received judicial interpretation, and it was there held that the county auditors in office at the time of the passage of the act were not ousted therefrom but that they continued therein until the expiration of their terms, Mitchell, J., saying: "In an exchange of offices there may naturally be some overlapping of terms and duties, and if in the legislative view the need for a controller was immediate but the existing terms of the auditors prevented his present assumption of all the duties that would finally pertain to his office, it would have been not unwise, certainly not unconstitutional, to meet the case by a temporary expedient. The legislature has not done so expressly, but it has passed an act which can best be carried out by such a construction."

If it be said that the Act of 1895 did not in express terms abolish the office of county auditor, while the Act of 1913 did so, the answer is that the Act of 1895 in its title gave notice that its purpose was to abolish the office of county auditor, and in its body directed that a county controller should be

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elected in place of a county auditor. The practical effect of these acts is the same. The office of county auditor was as effectually abolished by the Act of 1895, Com. *vs.* Samuels, et al., 163 Pa. 283, as by the Act of 1913. The case of Lloyd *vs.* Smith, et al., referred to, we think is decisive of the question which is here raised. Under the construction of the Act of 1895 adopted in that case, the present county auditors, John W. Cassel and Francis W. Riegle, are entitled to serve out the terms for which they were elected and to perform the duties of the office required by law. The conclusion to which we have come is the same as that reached in Com. *vs.* Commissioners of Erie Co., in a similar proceeding involving the right of the county auditors of that county to remain in office.

Several objections to the constitutionality of the Act of 1913 have been raised, which we do not think it is necessary to pass upon.

For the reasons above stated we direct that judgment be entered on the demurrer against the defendants and in favor of the Commonwealth; and upon formal application a writ of peremptory mandamus will be directed to issue.

CITY OF HARRISBURG *vs.* THE SMITH PREMIER TYPEWRITER COMPANY.

Cities—Taxes.

Under the Act of May 23, 1889, P. L. 286, as amended by the Act of May 16, 1901, P. L. 228, a city of the third class may levy and collect an annual license tax, for general revenue purposes, from every permanent establishment selling or leasing goods upon installments.

Case stated. C. P. Dauphin County, No. 52, March Term, 1909.

Homer Shoemaker, for plaintiff.

D. S. Seitz, City Solicitor, for defendant.

McCARRELL, J., July 16, 1914:

This is a case stated for the purpose of determining the liability of the defendant company to pay a license tax for each of the years 1905, 1906, 1907 and 1908, in pursuance of the

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This ordinance ordains that there shall be levied, collected and paid within the City of Harrisburg for general revenue purposes a license tax, *inter alia*, Clause XXXIV, for each and every permanent establishment selling or leasing goods upon installments, annually the sum of twenty-five dollars."

The case stated admits that the defendant company maintained during each of the years named a permanent establishment for selling or leasing goods upon installments in the City of Harrisburg.

The Act of May 23, 1889, P. L. 286, in Clause IV, Section 3, Article V, grants to cities of the third class, *inter alia*, the power "to levy and collect for general revenue purposes a license tax." This act was amended by Act of May 16, 1901, P. L. 228, by striking out the phrase "for general revenue purposes," thus granting the power "to levy and collect a license tax not exceeding one hundred dollars each annually on all auctioneers, contractors, druggists, hawkers, peddlers, produce or merchandise vendors, bankers, brokers, pawn brokers, merchants of all kinds, persons selling or leasing goods upon installments, grocers, confectioners, butchers, restaurants. . . . and to regulate the collection of the same."

The only amendment is the striking out of the words "for general revenue purposes." The power to levy and collect a license tax, *inter alia*, from "persons selling or leasing goods upon installments" is thus specifically granted.

It is contended by the defendant that the dropping of the words "for general revenue purposes" deprives the city of the power to impose this license tax, and that the delegation of the power with this limitation must be considered as the grant of power only for police regulation and not for revenue purposes.

The amendment of 1901 seems to have been intended to enlarge the power of municipalities to levy and collect a license tax. It appears to grant the authority to collect the designated tax from the specified subjects without any limitation as to the purpose of the tax. The legislature has given the power to levy and collect this license tax for each establishment, such as the defendant admits it maintained during the years in question. The license tax imposed seems to have been clearly within the legislative authority.

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The question here raised seems to have been determined in favor of the plaintiff in the case of Oil City *vs.* Trust Company, 151 Pa. 454.

We, therefore, direct that judgment be entered in favor of the plaintiff and against the defendant for the amount of tax claimed during the years in question.

IN THE MATTER OF THE INCORPORATION OF PAXTANG BOROUGH.

Boroughs—Incorporation—Inclusion of farm lands.

In passing upon the propriety of including farm lands within the limits of a proposed borough, the controlling consideration is the advantage of the entire community.

Petition for incorporation of borough. Quarter Sessions of Dauphin County. No. 156 March Sessions, 1913.

Charles C. Stroh and *Snodgrass & Snodgrass*, for petition.

Charles H. Bergner, contra.

McCARRELL, J., June 22, 1914.

A number of exceptions have been filed to the granting of the prayer of the petitioners. The principal one, however, is that filed by the heirs of S. S. Rutherford, who protest against including about one hundred and six acres of their land within the borough limits. This land immediately adjoins the village of Paxtang, and is between that village and the city of Harrisburg. It is used for farming purposes, although two or three dwelling houses have been erected upon it, which are occupied by the owners.

The Act of June 26, 1895, P. L. 389, (1 Purdon 479) provides that the court shall grant the prayer of the petitioners and make a decree accordingly "if it shall find that the conditions prescribed by law have been complied with and shall believe that it is expedient to grant the prayer of the applicants."

The conditions of the law have been complied with. The only question is as to the expediency of granting the prayer of the applicants.

The Act of April 1, 1863, P. L. 200, (1 Purdon 481) provides that "whenever an application has been or shall hereafter be made by the freeholders of any township or village in the

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commonwealth for an act of incorporation into a borough and the boundaries fixed by the petitioners shall embrace lands exclusively used for the purpose of farming and not properly belonging to the township or village, the Court of Quarter Sessions of the county where such application is made shall have power at the request of the parties aggrieved to change and modify such boundaries so as to exclude therefrom the land used for farming purposes."

Before excluding the Rutherford lands we must be satisfied that they are used exclusively for farming purposes, and that they do not properly belong to the township or village. The testimony is uncontradicted to the effect that the lands are exclusively used for farming purposes. As already stated, they directly adjoin the village of Paxtang and lie between the lands of the village and the line of the city of Harrisburg.

In re Prospect Park Borough, 166 Pa. 502, the general principle by which we are to be guided is thus stated by the court at page 506:

"The question of necessity or expediency of incorporating a village and adjacent territory into a borough, does not depend so much upon the will of a majority of the freeholders residing outside the limits of the proposed borough, or upon the unanimous consent of those residing within the proposed lines, as it does upon the fact that the advantages to the whole people, as a community, will overbalance the disadvantages. While it may be true in this case, that inclusion, within the borough limits, may not be immediately advantageous to a few, we think the established facts warrant the conclusion that, as to the entire community, the advantages of incorporation will greatly exceed the disadvantages."

We are inclined to believe that the inclusion of the Rutherford lands will be advantageous to the whole community. It will make the borough line coincide with the line of the city of Harrisburg and cause the two municipalities to be immediately adjoining.

The suggestion that these lands are separated by a stream from the present village of Paxtang, that there is a ravine between the two and that any arranging for streets so as to conform with the streets of the present village would be exceedingly expensive, if not entirely impracticable, does not seem to us to be of controlling importance. The borough authorities,

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if incorporation be granted, will doubtless wisely determine these questions.

The owners of the land some years ago, considering the probabilities of the future, prepared a tentative plan or lay-out of lots upon this land, indicating thereon some of the streets so as to connect with the streets of the village. It is true that this plan has not been recorded nor have any lots been sold in accordance therewith. The owners, however, must have believed that there was a probability of their lands being connected with the present village and of their lands being in demand for building purposes. We believe in the light of all the testimony that this is the fact, and that the lands now used for farming will, in a very short time, if the incorporation asked for be granted, be in demand for building purposes. The village of Paxtang has increased rapidly in the last three years and the growth apparently continues. The city is being crowded and many citizens desire to get into a locality where they can have more ground about them and be more comfortably situated than in the crowded city. The residents of the village are greatly in need of better streets, and while the lot owners in the village have been paying their road taxes to the township, the township has not expended any money upon the streets of the village, because they have never been laid out as public highways. The residents of the village also desire to have their streets lighted and are unable to do this without the creation of a corporation. They also need police and fire protection. They are located near the Paxtang Park and large numbers of people go back and forth between the park and the city, at times creating disorder and disturbance which the residents of the village are unable to control by the action of any officer.

While the present population of the village is only about 275 persons, it is growing rapidly. It is near the city of Harrisburg and is readily accessible therefrom, the trolley service being frequent and for a single fare. Its location and surroundings make it a desirable place for residences. That the village will increase rapidly in population if given a borough government can hardly be doubted, and room for future growth should be provided. While it may be that the present residents do not require any additional land for their own personal uses the incoming population must be accommodated and the natural location for this population will be between the western

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line of the village and the eastern line of the city of Harrisburg. Residents of the city seeking homes outside will be attracted by lands and lots immediately adjoining the city, and the growth of the borough will be promoted by including within its limits the land now between the western village line and the eastern city line. Very many of the present residents of the village were formerly residents of the city. The land of the exceptants seems naturally and properly to belong to the village and to be a very desirable place for any increase in population, as the trolley service along its front is more frequent than in front of the residences lying east of the present village line.

After careful consideration we are satisfied that while the inclusion of the lands of exceptants within the borough limits may not be immediately advantageous to them, the advantages to all people interested as a community will largely overbalance all disadvantages and that the exceptants themselves will be greatly benefited in the near future. We find that the conditions prescribed by law have been complied with, and believe that it is expedient to grant the prayer of the applicants. We therefore dismiss the exceptions and direct that a formal decree of incorporation according to the prayer of the petitioners be prepared and presented for our consideration.

COMMONWEALTH OF PENNSYLVANIA *vs.* THE TONOPAH AND
GOLDFIELD RAILROAD COMPANY.

*Foreign corporations—Doing business in Pennsylvania—Tax
on corporate indebtedness.*

A foreign corporation owned and operated a railroad in the state in which it was incorporated, maintained its principal office there, kept its accounts there and did everything in connection with the actual operation of its road there. It maintained an office in Pennsylvania for the convenience of its secretary and for the use of its directors who held their meetings there and gave directions as to the operation of the road. The office was also used for the convenience of Pennsylvania stockholders in transferring stock. It had no property in Pennsylvania, except office furniture of the value of \$500. The interest on its corporate indebtedness was payable at the office of the Land Title and Trust Company, in Philadelphia, Pennsylvania.

Held, That the corporation was not doing business in Pennsylvania,

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within the meaning of the Act of June 30, 1885, P. L. 193, and that it was not its duty to collect tax upon its corporate indebtedness.

Appeal from settlement for tax on corporate indebtedness. C. P. Dauphin County. No. 119 Commonwealth Docket, 1911.

W. M. Hargest, Second Deputy Attorney General, for commonwealth.

Olmsted & Stamm, for defendant.

KUNKEL, P. J., Sept. 18, 1914.

This is an appeal by the defendant from the settlement of an account against it by the auditor general and state treasurer for the loans tax for the year 1910. It has been submitted to us for trial without a jury. The facts are not in dispute and we find them to be as follows:

FACTS.

The defendant is a corporation of the state of Nevada. It owns and operates a railroad in that state. Its principal office is there. All its accounts have at all times been kept in that state. All its supplies during the year 1910 were and still are ordered there and the clerical force of the company in that year was kept and employed there. Everything done in connection with the actual operation of its road was done there. However, in the year 1910, it rented two rooms as an office in the Bullitt Building, in Philadelphia, for the use and convenience of its secretary, who lived in Philadelphia, and also for the use of its directors, the majority of whom were residents or maintained offices in Pennsylvania. At this office the directors held their meetings, received reports and information concerning the operation and condition of the defendant's property in Nevada and gave directions in respect to the conduct and operation of its road in that state; but no action was taken that resulted in the transaction of any business with citizens of Pennsylvania, or eventuated in business dealings in Pennsylvania or in connection with or concerning any business carried on in this state. The office was also used for the convenience of the Pennsylvania stockholders in transferring stock. The defendant had no property in this state except the office furniture of the value of \$500. The secretary was the only salaried employee in this state. The interest on the indebtedness with respect to which

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the tax is claimed was payable at the office of the Land Title and Trust Company, in Philadelphia.

On June 5, 1911, the auditor general and state treasurer settled an account against the defendant company for the tax on its loans or indebtedness of \$421,000, amounting after deducting the treasurer's commission, to \$1,627.16. From this account it duly appealed.

DISCUSSION.

The question presented is whether the defendant under these facts was doing business in the state of Pennsylvania. The Act of June 30, 1885, P. L. 193, requires the treasurer of every private corporation incorporated under the laws of this commonwealth or the laws of any other state or the United States and "doing business in this commonwealth," to assess and deduct from the interest which it pays on its indebtedness owned by residents of this commonwealth the four mills tax on such indebtedness (Act of June 1, 1889, amended by the Act of June 8, 1891, P. L. 229), and to pay the same into the state treasury. Upon wilful failure or neglect to perform those duties the corporation itself becomes liable for the tax. *Com. vs. Phila. and Reading R. R. Co.*, 150 Pa. 312; *Com. vs. Division Canal Co.*, 123 Pa. 594; *Com. vs. L. V. R. R. Co.*, 129 Pa. 449; *Com. vs. L. V. R. R. Co.*, 186 Pa. 235.

The commonwealth contends that the fact that the directors of the defendant company met in this state and here received reports and gave directions with respect to the conduct of the defendant's operations in the state of Nevada amounted to the doing of business by the defendant in this state within the meaning of the Act of 1885. We are not able to agree with this contention. The meaning of the phrase "doing business in this commonwealth," as used in the state revenue laws, has been passed upon by this court and by the Supreme Court in *Com. vs. Standard Oil Co.*, 101 Pa. 119, and in *Com. vs. The Conglomerate Mining Co.*, reported in 1 Dauphin County Reports, p. 85. This phrase is synonymous with the phrase "going into operation in this state," or employing capital or using property in this state, and is to be interpreted to mean the employment or investment of capital or the use of property in the state by a corporation in furtherance of its corporate purposes. *Com. vs. Telephone Co.*, 129 Pa. 217. This defendant company uses and employs no property for such purpose in this

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state. It is operating a railroad in the state of Nevada. It is true that its directors meet here and give directions with respect to the operation of the railroad, but the actual operation of the road takes place in the state of Nevada and its corporate purposes are carried out there. We are unable to see how it can be held under these circumstances to be doing business in this state, either in the statutory sense or in the ordinary acceptance of the phrase. The purpose for which the defendant was chartered was to operate a railroad in another state, and to that end it is exercising its corporate franchises there and not in this state. The action of its directors resident in this state in directing and supervising its operations, which are actually carried on in another state, can in no reasonable view, we think, be held to place the defendant in the position of doing its corporate business in this state.

Moreover, it may be observed that the duty of assessing and collecting the tax is imposed by the Act of 1885 on the treasurer of the company. There is no proof that the treasurer of the company resided or lived in the state or paid the interest on the indebtedness in this state. It appears that the only salaried officer in the state in the year 1910 was the secretary, and it also appears that the interest on the indebtedness on account of which the present tax is claimed was payable at the Land Title and Trust Company in Philadelphia. The Act of 1885 has no operation beyond the limits of this state; therefore it did not extend to the non-resident treasurer of this company. These facts bring the case within the ruling in *Com. vs. Barrett Mfg. Co.*, lately decided in this court and affirmed by the Supreme Court, in which it was said by the latter court that, "Since treasurers are specifically named in the act (that is the Act of 1885) to perform both these duties (that is the duties of assessing and collecting the tax), we cannot by implication or upon any proper theory of law or statutory construction transfer this high obligation to a corporation designated as a mere paying facility, such as the Land Title and Trust Company is in this case." It would seem from this that the duties imposed by the statute must be performed by the treasurer, as he is the officer named therein. Neither the secretary of this company nor the Land Title and Trust Company of Philadelphia had any authority to perform these duties, and as the treasurer was beyond the operation of the statute it was inef-

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fective to bind the defendant. For this reason also it is not liable for the tax which is here claimed.

CONCLUSIONS OF LAW.

Wherefore we conclude:

1. That the defendant company, under the facts as found, is not doing business in this commonwealth within the meaning of the term as used in the Act of June 30, 1885, P. L. 193.
2. That it was not the duty of the defendant company to collect the tax claimed in this settlement.
3. That the defendant company is not liable for the tax settled against it.
4. That the defendant is entitled to judgment.

Wherefore judgment is directed to be entered in favor of the defendant company and against the commonwealth, unless exceptions be filed within the time limited by law.

COMMONWEALTH OF PENNSYLVANIA vs. PITTSBURGH FIRE INSURANCE Co.

Corporations—Bonus on capital stock.

A corporation organized under a special act of assembly by which it is authorized to have capital stock to the amount of \$300,000, without payment of bonds, is not liable for bonus on an increase of capital stock, which is within the amount originally authorized.

FACTS.

For the purposes of this case the plaintiff and the defendant admit the following facts, both parties reserving all objections to the relevancy or materiality of the facts so admitted:

First. The Pittsburgh Fire Insurance Company was incorporated by the Act of February 10, 1851, P. L. 35, with the right to have capital stock to the amount of \$100,000, without the payment of bonus. By the Act of March 27, 1854, P. L. 217, the company was authorized to change its name, to increase the number of directors and to increase its capital stock to any amount not exceeding \$300,000, without the payment of bonus. By the Act of February 18, 1859, P. L. 76, the company was authorized to change its name.

Second. The stockholders of the Pittsburgh Fire Insurance Company, at a meeting held the eighth day of February, 1910,

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passed resolutions accepting the provisions of the constitution and agreement to be subject to the provisions of the Insurance Act of May 1, 1876.

Third. On February 8, 1910, the stockholders of the Pittsburgh Fire Insurance Company voted to increase its capital stock from \$100,000 to \$200,000.

Fourth. On January 2, 1911, the treasurer of the Pittsburgh Fire Insurance Company filed a return with the secretary of the commonwealth shewing that an increase of \$100,000 in the capital stock of said company had been issued.

Fifth. On January 19, 1911, the auditor general and state treasurer settled and entered a bonus account against the Pittsburgh Fire Insurance Company upon an increase of capital stock from \$100,000 to \$200,000, under the Act of May 1, 1868, P. L. 108, and the supplements thereto.

Sixth. On March 16, 1911, the Pittsburgh Fire Insurance Company filed its appeal from the bonus settlement made against it on January 19, 1911.

Appeal from settlement for bonus on capital stock. C. P. Dauphin County. No. 30 Commonwealth Docket, 1911.

W. M. Hargest, Second Deputy Attorney General, for plaintiff.

Homer Shoemaker, for defendant.

KUNKEL, P. J., Sept. 26, 1914.

This is an appeal by the defendant company from a settlement made against it by the accounting officers of the commonwealth, in which it is charged with a bonus of \$333.34 on an alleged increase of capital stock. The case has been submitted to us for trial without a jury, and the facts have been agreed upon by the parties in a written statement, which has been filed in the case.

DISCUSSION.

The defendant denies its liability for the bonus and contends that its position is supported by *Com vs. R. R. Co.*, 207 Pa. 154. The commonwealth claims that the question of its liability is ruled by *Com. vs. Independence Trust Co.*, 233 Pa. 92. In the former case, the Act of May 3, 1899, P. L. 190, under

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which the bonus is charged in this case, was held not to apply to that company. The capital stock which it issued did not exceed the amount which it was authorized to have, and it was held that it was not liable for bonus. In the latter case, the right of the commonwealth to bonus was conceded and the only question presented for determination was that of the rate of bonus which it should pay. We are of the opinion that the question presented is ruled by the former case, so far as that case is applicable to the present one.

The defendant company, by the acts of assembly under which it was organized and under which its name was changed, was authorized to have a capital stock of \$300,000 without the payment of bonus. Originally it issued capital stock to the amount of \$100,000, and subsequently, on February 8, 1910, it voted what it called an increase in its capital stock of \$100,000, making a total paid-in capital of \$200,000, an amount still within the limits of its authorized capital. Upon the latter \$100,000 the bonus is claimed by the commonwealth. We do not understand that this action of the defendant company was an increase of its capital stock within the meaning of the statutes relating to the payment of bonus. The increase means an increase over the authorized capital stock. Section 2, Act of May 3, 1899, P. L. 190. The defendant's authorized capital stock was \$300,000, and this amount it was entitled to have without the payment of bonus. When it shall exceed this amount then the defendant may be said to have increased its capital stock and upon such increase it will be chargeable with the bonus prescribed by law.

The commonwealth suggests that by accepting the Constitution of 1874 and the provisions of the Insurance Act of May 1, 1876, P. L. 53, the defendant company became subject to the legislation relating to bonus. We have not been shown by what authority or by what method the acceptance was accomplished, and we are therefore not prepared to say that it had the effect which the commonwealth claims. The right to have a capitalization of \$300,000 without the payment of bonus is a charter right with which no legislation can lawfully interfere. *Com. vs. Erie & Western Transportation Co.*, 107 Pa. 112. And there is nothing before us to show that the defendant in any way voluntarily surrendered it.

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CONCLUSIONS OF LAW.

We therefore conclude:

1. That the defendant is not chargeable with bonus on the \$100,000 of capital which it issued under its charter.
2. That the defendant is entitled to judgment.

Wherefore judgment is directed to be entered in favor of the defendant and against the commonwealth unless exceptions be filed within the time limited by law.

IN THE MATTER OF THE GRANTING OF FREE TRANSPORTATION
TO CHARITABLE ORGANIZATIONS.

Public Service Commission. Administrative Ruling No. 4.

BY THE COMMISSION, August 5, 1914.

The Commission has been requested to express its opinion upon the question whether a railroad company, street railway company, or other transportation company, may lawfully grant free passes to charitable organizations.

As we have heretofore had occasion to point out, in connection with similar questions relative to the subject of free transportation, the Constitution of the Commonwealth, in Article XVII, Section 8, expressly provides, that:

"No railroad, railway or other transportation company, shall grant free passes or passes at a discount, to any person except officers or employees of the company."

So long as this prohibition remains as it now stands in the Constitution, the Commission is powerless to hold that free transportation may be issued to a charitable organization for charitable purposes, however much we might otherwise be in accord with a public policy which would permit of such free transportation in this class of cases.

COMMONWEALTH OF PENNSYLVANIA *vs.* TORRANCE LAND COMPANY.

Corporations—Bonus on capital stock.

The authorized capital stock of a corporation was 110 shares of the par value of \$50 per share, or \$5,500, and upon this amount bonus was paid. Each stockholder when he received his certificate paid to the corporation \$500 for each share of stock issued to him, making the total amount paid in \$55,000.

Held, That the corporation was liable for bonus on \$55,000.

Assumpsit for bonus on capital stock. C. P. Dauphin County. No. 255 Commonwealth Docket, 1912.

Wm. M. Hargest, for plaintiff.

Homer Shoemaker, for defendant.

McCARRELL, J., September 24, 1914.

This is an action of assumpsit brought upon a settlement for bonus on capital stock, made by the auditor general and state treasurer July 1, 1912. The settlement is unappealed from, and under the law is conclusive against the defendant company. On August 30, 1912, the defendant filed a petition with the auditor general asking for a resettlement of the account, alleging that its capital was only \$5,500 and not \$55,000 as found by the accounting officers in the settlement. The defendant has filed an affidavit of defense averring that the authorized capital of the company is only \$5,500, that its capital was never increased, and that any statements appearing upon the company's reports to the auditor general that the capital was \$55,000 were erroneous. The affidavit of defense, however, specifically avers that when the 110 shares of the capital stock of the said defendant were issued each stockholder paid into the treasury of the said defendant at the rate of \$500 for each share of stock issued to him and received therefor a certificate for the number of shares for which he had subscribed at the par value of \$50 each.

Trial by jury has been duly waived. The commonwealth presented capital stock reports of the defendant for the years 1905, 1906, 1907, 1908, 1909, 1910, and 1911, in each of which the authorized capital is stated to be \$55,000, and the amount of capital paid in \$55,000. This amount is stated as a liability

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of the company in these reports. The affidavit of defense shows that at the time of the organization of the company each stockholder paid \$500 per share for each share of the capital stock issued to him, and thus there was contributed by the stockholders at the date of the organization of the company the sum of \$55,000 for corporate purposes. The application, approved July 16, 1901, states that the authorized capital is only \$5,500. According to the affidavit of defense the \$500 per share contributed by each stockholder for each share of his stock at the time of the organization was a contribution to the capital stock of the company, and the reports of the corporate officers for the years above mentioned show that it was regarded by the corporation as capital stock. No proof to the contrary was offered.

The Act of May 3, 1899, P. L. 189, requires the payment of a bonus of one-third of one per cent. upon the amount of the capital stock which said company is authorized to have and a like bonus on any subsequent authorized increase thereof. The Act of February 9, 1901, P. L. 3, provides as follows:

"Upon the actual increase of capital stock of such corporation it shall be the duty of the president or treasurer to make a return and pay such bonus on the actual increase shown by said return as shall then be prescribed by law."

These acts clearly impose a bonus upon the capital stock possessed by every corporation of the state, and we are satisfied that the defendant company has actually possessed a capital stock of \$55,000 from the time of its organization. Its stockholders contributed this money for the capital stock certificates issued to them, and there is no evidence that there was any stipulation or understanding that any part of the amount so contributed was regarded as surplus, or intended to be regarded as anything else than capital stock of the corporation. The settlement made July 1, 1912, and unappealed from, is under the law conclusive upon the defendant. It, however, filed an application for a resettlement upon the last day when it could have taken an appeal. The accounting officers refused to make any resettlement and certified the settlement already made to the attorney general for collection, but we have considered the questions raised by this application.

From all the evidence submitted to us we find that the capital stock of the defendant company at the time of its organization, authorized, and actually contributed by the stockholders was

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\$55,000, and that the bonus paid was only on \$5,500. At the time of settlement there was legally due to the commonwealth for balance of bonus due upon capital stock the sum of \$165, as stated in the settlement. We therefore direct that judgment be entered in favor of the commonwealth and against the defendant for the sum of \$165, with interest from August 30, 1912, unless exceptions be filed within the time limited by law.

INDEBTEDNESS OF SCHOOL DISTRICT.

School districts—Increase of indebtedness.

Until appropriate legislation has been enacted to carry into effect the amendment to Article IX of the State Constitution, no school district can avail itself of the power to increase indebtedness, provided by the amendment.

Attorney General's Department. Opinion to Nathan C. Schaeffer, Superintendent of Public Instruction.

BELL, Attorney General, May 7, 1914.

This department is in receipt of your communication of February 17, 1914, asking to be advised whether the amendment to Article IX of the State Constitution, adopted in November, 1913, relative to the increase of the indebtedness of counties and municipalities, applies to school districts.

The question you submit seems to be purely academic and it does not appear from your communication that any particular school district desires to increase its present indebtedness for any specified purpose or under any particular circumstances.

In passing upon the question of the right of any municipality to increase its indebtedness regard must be had to the existing indebtedness, the purpose of the increase and other essential facts.

Assuming, however, that your inquiry is simply a general request to be advised as to whether school districts are intended to be included within the "municipalities" referred to in the amendment under discussion, it becomes necessary to give some consideration to the general subject of the increase of indebtedness by municipalities.

By the adoption of the amendment of 1913, a new section was added to Article IX of the Constitution of 1874. The

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original Section 8 of Article IX (relating to taxation and finance) provided, in substance, that the debt of "any county, city, borough, township, school district or other municipality or incorporated district . . . shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors thereof at a public election in such manner as shall be provided by law," etc.

In 1911, this Section 8 of Article IX was amended so as to provide, in substance, that any debt or debts thereafter incurred by the city and county of Philadelphia for the construction and development of subways or wharves and docks, etc., which should yield to the city and county a current net revenue in excess of the interest on such debt or debts and of the annual installments necessary for the cancellation thereof, may be excluded in ascertaining the power of the city and county of Philadelphia to become otherwise indebted. This amendment affected only the county and city of Philadelphia.

Following out the idea thus adopted for the city of Philadelphia, the people of the commonwealth, in 1913, added a new section to the article in the form of the amendment referred to in your communication. This amendment of 1913 has a two-fold purpose. In the first place, it provides, in substance, that, in ascertaining whether "any county or municipality other than Philadelphia" has the power to increase its indebtedness, certain obligations may be excluded from the calculation of its existing indebtedness, that is, shall not be considered as debts within the meaning of said Section 8 of Article IX. And, in the second place, it provides that municipalities or counties "may incur indebtedness in excess of *seven* per centum and not exceeding *ten* per centum of the assessed valuation of the taxable property therein if said increase of indebtedness shall have been assented to by *three-fifths* of the electors voting at a public election in such manner as shall be provided by law."

For the purpose of attaining the first object of the amendment the people have said that no obligations, heretofore or hereafter issued "by any county or municipality other than Philadelphia" to provide for the construction or acquisition of water works, subways, underground railways or street railways or the appurtenances thereof, shall be considered as a

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debt of a municipality within the meaning of Section 8 of Article IX of the Constitution, or within the meaning of this amendment, if the net revenue derived from the property shall be sufficient to pay interest and sinking fund charges during certain specified periods.

After making certain modifications of the requirements of Section 10 of Article IX relating to the levying of taxes to pay interest and sinking fund charges, the amendment further provides that "any of the said municipalities or counties" may incur indebtedness in excess of seven per centum and not exceeding ten per centum of the assessed valuation of the taxable property therein, provided such increase shall have been assented to by three-fifths of the electors voting at a public election in such a manner as shall be provided by law.

Your inquiry would seem to relate to the last mentioned feature of the amendment, for it is difficult to conceive how any school district could construct or acquire water works, subways or railways within the meaning of the first provision of the amendment.

The purposes for which school districts may incur or increase an indebtedness to an amount not exceeding seven per centum of the assessed value of taxable property for school purposes are set forth in Section 506 of Article V of the School Code of 1911, P. L. 332, and do not include the above mentioned subjects.

It is to be noted that the general purpose of the amendment is, in the first place, to define what indebtedness may be excluded in ascertaining the borrowing power of a municipality as that power is limited by Section 8 of Article IX, and, in the second place, to increase the borrowing capacity itself by raising the limit, beyond which no municipality can go, even by a popular vote, from seven per centum to ten per centum of the assessed valuation of taxable property, provided the increase, above seven and not exceeding ten per centum, is assented to by three-fifths of the electors in the municipality.

The language of the amendment, in describing the political divisions of the state to which it is intended to apply is "any county or municipality other than Philadelphia" and, in the latter part of the amendment, "any of the said municipalities or counties."

The language of the original section is "any county, city, bor-

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ough, township, *school district* or other municipality or *incorporated district*."

The question arises whether the word "municipality" in the amendment is intended to include school districts. In discussing the meaning of the word "municipality," as used in our present Constitution, Judge Simonton, in the case of Commonwealth, ex rel., vs. County Commissioners of Dauphin County, 23 Pa. C. C. 646, said

"Cities and boroughs are in the strict sense of the term municipal corporations. Counties and townships have corporate power expressly conferred on them by the Act of April 15, 1834, P. L. 538, but are sometimes said to be only quasi corporations or quasi municipal corporations, because they have no legislative power. But all of these cities, boroughs, counties and townships are indiscriminately known as municipalities. They are so designated in Article IX, Section 8, of the Constitution, which restricts the limit of the creation of the debt of any county," etc.

School districts are, of course, included by name in the original Section 8 and there has never been any doubt about the provisions of that section applying to school districts.

Luburg's Appeal, 23 W. N. C. 454.

By the School Code of 1911, Article I, Section 119, P. L. 314, it is provided that "the several school districts in this commonwealth, established by this act, shall be and hereby are vested, as bodies corporate, with all necessary powers to enable them to carry out the provisions of this act."

By Sections 123 and 124, it is provided that each school district shall have the right to sue and be sued in its corporate name; that legal process shall be served upon the president or secretary of its Board of School Directors and that each district may, by a majority vote of the Board of Directors, adopt a corporate seal for the use of said district.

Reading the amendment in connection with the original Section 8 and the prior amendments thereto, as it is proper for us to do, I am of opinion that the amendment now under discussion is intended to apply to all of the municipalities mentioned in the original section, including school districts. I am unable to see, however, that this conclusion is of any practical importance at this time for, as already pointed out, it seems scarcely conceivable that any school district could legally contemplate the construction or acquisition of water works, subways or

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street railways from which it is proposed to derive sufficient net revenue to exclude the obligations issued for such purposes from a calculation of the indebtedness of a school district.

Further, in so far as the provision of the amendment authorizing municipalities to incur or increase an indebtedness to an amount not exceeding ten per centum of the assessed valuation of the taxable property therein upon obtaining the assent of three-fifths of the electors thereof is concerned, I am of opinion that enabling legislation will be necessary before this provision of the amendment will become operative. It was evidently not intended that the amendment should be self-acting. The provision here that the indebtedness may be incurred or increased only with the assent of the electors is similar to the provision on the original Section 8. Both the original section and the amendment authorize the increase of the indebtedness of the municipality above two per centum of the assessed valuation of taxable property only when the assent, under the original section, of a majority and, under the amendment, of three-fifths of the electors has been obtained at a public election, held in such manner as shall be provided by law.

The language of the amendment does not seem to indicate an intention to use the machinery, now provided by law for increasing indebtedness to seven per centum, for the purpose of increasing an indebtedness to ten per centum with the assent of three-fifths of the electors, but, on the contrary, contemplates additional enabling legislation.

The method of securing this assent, under the original article of the Constitution, was prescribed by legislative enactments providing, in detail, for the submission of the question of the increase of the debt of a municipality to the electors—the Act of April 20, 1874, P. L. 65, and the supplementary Acts of June 9, 1891, P. L. 252, and of April 13, 1897, P. L. 18, being examples of this kind of legislation.

Until, therefore, appropriate legislation for carrying the latter part of the amendment into effect has been enacted, no school district can avail itself of the power to increase its indebtedness, even with the consent of three-fifths of the electors, to an amount not exceeding ten per centum of the assessed value of the property therein taxable for school purposes.

COMMONWEALTH OF PENNSYLVANIA *vs.* THE INDEPENDENT
REFINING COMPANY, LIMITED.

*Limited partnerships—Tax on capital stock—Exemption of
capital invested in manufacturing.*

So much of the capital stock of a limited partnership engaged in manufacturing illuminating oils, gasoline and other products from petroleum, as is invested in tank cars used in shipping its various products to market, is exempt from tax.

Appeal from settlement for tax on capital stock. C. P. Dauphin County, No. 171 Commonwealth Docket, 1913.

Wm. M. Hargest, for plaintiff.

James A. Stranahan and Fox & Parker, for defendant.

KUNKEL, P. J., October 16, 1914.

This is an appeal by the defendant from the settlement of an account against it for tax on its capital stock for the year 1912. It has been submitted to us for trial without a jury. The facts are not in dispute and we find them to be as follows:

FACTS.

The defendant is a limited partnership association organized for and engaged in manufacturing illuminating oils, gasoline and other products out of petroleum. For the purpose of its business it owns and uses sixty-seven tank cars, in which it ships its various products to the market, paying the railroad companies for hauling them to their destinations and returning them to the factory. The cars are differently equipped, so as to be suitable for the particular product intended to be carried in them. One kind of tank cars cannot be used indiscriminately for the different products. The railroad companies have either refused or failed to furnish cars of the character needed, making it necessary for the defendant to supply itself with them. Nearly all its products are shipped and delivered to the market in these tank cars, except a small portion intended for the local trade, which is shipped in wooden barrels. However, the Interstate Commerce Commission prohibits the shipment of gasoline in wooden barrels. The only witness in the case, the manager and treasurer of the company, testified that the cars are just as essential a part of the defendant's plant as the boil-

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ers, storage tanks, receiving tanks, pumps or loading racks used to conduct its operations, and that it would be an impossibility to carry on the business without them. This we find to be the fact. The cost of shipping the products to the market in the cars is greater than the cost of shipping them in wooden barrels or in other containers. The Pennsylvania Railroad is connected with the defendant's establishment, which is located on the line of that road. The amount of capital stock represented by the investment in the sixty-seven tank cars is \$56,930.

On October 3, 1913, the present settlement was made, in which the defendant was taxed on \$65,875 of its capital stock, the tax thereon amounting to \$329.37. In this amount of capital stock was included \$56,930, representing the investment in the tank cars. The defendant paid \$44.72 on the settlement, but claiming that, as it was a manufacturing company it was not liable on the capital stock so invested, took this appeal.

DISCUSSION.

The sole question presented is whether or not so much of the capital stock of the defendant company as is represented by the tank cars is subject to the tax imposed by the Act of June 1, 1889, amended June 8, 1891, supplemented June 8, 1893, P. L. 353. It appears that the tank cars are used by the defendant for the purpose of delivering its manufactured products to the market, and that its business could not be conducted without them. They are hauled by the railroad companies over their lines and by this means the defendant delivers its products to its customers. We can see no real difference between this method of delivering its products and that of delivering by horses and carts or by other vehicles. If the defendant invested its capital in purchasing the latter means to haul its manufactured products to its customers, it would be deemed a necessary investment, and strictly incident and appurtenant to its manufacturing business. The right to sell its products in the open market is a necessary incident to the right to manufacture, and the right to sell includes the right to deliver or cause to be delivered to those who purchase. Without the sale and delivery of its products the business of the defendant could not be carried on. It is quite clear, therefore, that the part of the defendant's capital stock represented by the tank cars falls within the proviso of the Act of June 8, 1893, which exempts from taxation so much of a manufacturing company's capital

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stock as is invested in and actually and exclusively employed
in carrying on its manufacturing business.

CONCLUSIONS OF LAW.

Wherefore we conclude:

1. That the capital stock referred to is exempt from the capital stock tax by the proviso of the Act of June 8, 1893.
2. That the defendant is not liable to the commonwealth on that item of the account settled against it.

Wherefore judgment is directed to be entered against the commonwealth and in favor of the defendant, unless exceptions be filed within the time limited by law.

COMMONWEALTH vs. JOHN B. STETSON COMPANY.

Corporations—Capital stock—Taxation—Exemption.

A manufacturing corporation whose business requires the expenditure of large sums of money for materials at uncertain times, and which temporarily invests the money so needed in securities readily convertible into cash, is exempt from tax on the amount of its capital stock so invested.

Appeal from settlement for tax on capital stock. C. P. Dauphin County, No. 546 Commonwealth Docket, 1911.

Wm. M. Hargest, for plaintiff.

Olmsted & Stamm, for defendant.

McCARRELL, J., October 19, 1914.

This is an appeal by defendant from a settlement of tax on capital stock made by the accounting officers of the commonwealth. Trial by jury has been duly waived. The appeal complains that a claim for exemption as a manufacturing company was not allowed. The defendant is a manufacturing corporation with assets of nearly \$15,000,000, employing about 5,000 persons, and doing an annual business of from \$4,000,000 to \$9,000,000. It claimed exemption under the proviso of our Act of 1893 of \$2,420,956.82 from taxation upon the ground that the same was working capital and within the meaning of the law actually and exclusively employed in manufacturing. This amount is largely invested in high class securities listed

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on stock exchanges and is so invested because of the readiness with which the securities can be converted into cash. The securities yield a higher rate of interest than could be obtained by depositing the money in bank. The affidavit of the treasurer of the defendant has by agreement been received in evidence. It sets out particularly the line of business in which defendant is engaged and alleges the necessity of carrying large sums of money in order to enable it to purchase the necessary material required in its business. It uses a large number of animal skins which must be bought in foreign lands and the supply of which is uncertain and inadequate. He alleges that it is quite important to be able whenever an opportunity presents itself to purchase material of this kind to have on hand the necessary funds with which to make the purchases. He says that if the opportunity offered the company would gladly invest more than \$2,000,000 in their purchase at once. He states also that the business of the corporation is growing and that additional improvements in the way of buildings and equipment are necessary in the immediate future, and that the cost will be nearly \$2,000,000 for buildings alone. To provide for all these needs the securities above mentioned have been purchased and are carried. The securities are sold as they are needed from time to time. The proceeds are used exclusively in the manufacturing business and have never been otherwise used. The sole purpose, he asserts, is to provide the defendant company with the material and equipment reasonably necessary for the conduct of its business. He further specifically testifies as follows: "The amount is no more than is necessary for the present and immediately prospective needs of the company's manufacturing business, considering the extent and nature of the business and its rapid development. To try to get along with less would be improvident, wasteful and dangerous and as impossible from the point of view of good business as to try to do business without accumulating enough cash from day to day to meet the monthly pay rolls." The allegations of this affidavit are not denied by any testimony offered in behalf of the commonwealth. The affiant, as an officer of the company, is undoubtedly familiar with the business operations and the business needs of the defendant. If his claim that this amount of money or securities was not reasonably necessary for the proper conduct of the manufacturing business, or was without foundation, testimony from persons engaged in the same or similar lines of

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business might have been produced to contradict it. This has not been done. The affidavit was admitted without question, doubtless because the commonwealth believed that its statements were true and it did not desire to cross-examine the affiant. We have no knowledge as to the needs of the business carried on by the defendant, except that which is furnished by the testimony submitted. This case is quite similar to that of *Commonwealth vs. Dilworth Bros. Co.*, 242 Pa. 194, in which a similar affidavit of a defendant corporation was submitted as the only evidence in support of a claim for exemption from taxation because of the employment of capital in the manufacturing business, and it was there held by the Supreme Court that the statements so made were to be accepted as correct unless proof to the contrary was offered, which was not done in that case. It has not been done in this, and we can find no reason for disregarding the statements of the official under oath, which we have already referred to. It certainly must be conceded that a manufacturing corporation has the right to have on hand the amount of working capital necessary for the proper conduct of its business, and this amount, under our statute, is entitled to be regarded as actually and exclusively employed in manufacturing, and is under the law exempt from taxation. The testimony as to the amount provided by this defendant as its necessary working capital, has, as already stated, not been contradicted. If the officers of the defendant company had not believed that the setting aside of this sum as working capital was reasonably necessary for the proper conduct of the business, it certainly would have been divided among the stockholders. The fact that it has not been so divided tends to confirm the testimony already referred to. We therefore have reached the following conclusions:

1. The defendant is entitled to the exemption from taxation which it claimed at the time of the settlement.
2. The sum of \$2,420.956.82, upon which the tax was imposed by the settlement is in contemplation of law working capital actually and exclusively employed in manufacturing and is therefore exempt from taxation.
3. The settlement made against the defendant company is without authority of law.

We therefore direct that judgment be entered in favor of the defendant and against the commonwealth, unless exceptions be filed within the time limited by law.

COMMONWEALTH OF PENNSYLVANIA *vs.* STANDARD UNDER-
GROUND CABLE CO.

Corporations—Capital stock—Taxation—Exemption of capital stock employed in manufacturing.

A corporation, engaged in manufacturing, which invests in securities readily convertible into cash, an amount of its capital stock sufficient to secure the money necessary to buy raw materials and meet the contingencies of its business, is entitled to exemption from taxation upon the capital so invested.

Appeal from settlement for tax on capital stock. C. P. Dauphin County, No. 149. Commonwealth Docket, 1910.

Wm. M. Hargest for plaintiff.

Olmsted & Stamm for defendant.

McCARRELL, J., October 21, 1914.

The defendant has appealed from a settlement of tax upon its capital stock made April 11, 1910. The tax was imposed upon the sum of \$951,528. The defendant contends that this amount of its capital is used actually and exclusively in its manufacturing business and that the same is therefore exempt from taxation. Trial by jury has been duly waived. This sum is invested in bonds and stocks of various corporations. The defendant is a manufacturing company created under the laws of Pennsylvania for the purpose of the manufacture of iron or steel or both, or of any other metal or any article of metal or wood, or both, including therein underground submarine and aerial cable for the transmission of electricity. It has manufacturing plants at Pittsburgh, Pennsylvania, Oakland, California, and Perth Amboy, New Jersey. Its capital stock is \$3,000,000, of which there has been paid in \$2,800,000. Its income for the year ending the first Monday of November, 1909, was \$11,336,144.69. Its expenditures were \$10,554,666.51, making the net earnings for the year \$831,849.85. It was agreed that the affidavit of Frank A. Rinehart, the treasurer, should be received in evidence as if he had appeared and had been duly examined as a witness in the case. He gives a statement of the several items held by the company, amounting in the aggregate to \$951,528. Among these securities is the stock of the Imperial Varnish Works of Newark, New Jersey,

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amounting to \$15,531.50, which represents the total issue of that company's capital stock. This New Jersey corporation manufactures varnishes and varnish cloth and paper, and was operated during the tax year exclusively by the defendant as an adjunct to its manufacturing business within the State of Pennsylvania. The stock of the Westinghouse Electric and Manufacturing Company and the bonds of the Independent Interstate Telephone and Telegraph Company were taken by the defendant company in payment for work done by it for these corporations. Mr. Rinehart further states that all these securities are readily convertible into cash and all or nearly all are listed on some stock exchange. The company's business is of such a character that at times it needs more cash than at others. When it needs cash it must be realized promptly. The company therefore has invested from time to time a portion of its excess funds in the purchase of securities upon which cash can readily be raised either by sale or hypothecation. He testifies that "these securities are as much a part of the manufacturing property and assets as would be an equal amount of cash reserved to meet the same kind of contingency as they are held to meet, namely, the contingency that arises from time to time that we need more money to buy raw materials, to pay wages, to carry accounts and to meet other expenses incident to the manufacturing business." Its report indicates that it does a considerable volume of business, and the treasurer testifies that it is impossible to foretell dangerous conditions with such accuracy that the defendant company can know at any time precisely when it will need more cash or how much it may need at any definite future time, and that it would be suicidal from a business point of view for the company to depend for money by borrowing in a market, the nature of which could not be anticipated and at a time when it might not be possible to borrow at all, when the company has the money of its own which it can hold and keep in reserve either by deposit in bank or the purchase of readily convertible securities as cash assets. The company does not deal in stocks or bonds or any like securities. It invests its funds in securities held as cash or current assets solely for the purpose of successfully carrying on the business, and Mr. Rinehart distinctly states that "these securities held as a reserve we would at once sell and divide the proceeds among the stockholders if we were

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reasonably certain that we could successfully carry on our business without them." The treasurer is presumably well qualified to determine the business or financial needs of the corporation defendant. We have no other information as to what amount of money, or securities readily convertible into money, is reasonably necessary to enable the defendant properly to carry on its business. In the opinion of this official the sum of \$951,528 is reasonably necessary and is actually required to meet the business needs of the corporation during the year. Its receipts during the year 1909 were \$11,333,144.69. The amount held in reserve, as stated by the treasurer, is less than one-tenth of this sum, and we are not satisfied, in the light of the only evidence submitted, that it is excessive. It is suggested by the commonwealth that this case is ruled by the case of *Commonwealth vs. Custer City Chemical Co.*, 16 Dauphin County Reports 46, and *Commonwealth vs. New York and Pennsylvania Company*, 16 Dauphin County Reports 51. The Custer Chemical Company had purchased 75,000 cords of timber sufficient for its business operations for six years. The New York and Pennsylvania Company had purchased 83,000 acres of timber land and timber rights, thus insuring a supply of timber for its corporate purposes for very many years. We held in these cases that these timber lands and timber rights were not exempt from taxation under the proviso to our Act of June 8, 1893, P. L. 353, not being actually and exclusively employed in carrying on manufacturing. Those cases differ entirely from the one now under consideration. Here the only testimony submitted is to the effect that the cash and securities making up the \$951,528 are held as working capital, believed to be reasonably necessary for the conduct of the business of the defendant during the tax year. This amount is not held for the future needs of the corporation, but for its business purposes from day to day during the year, and therein it differs entirely from the cases to which reference has been made.

In *Commonwealth vs. Curtis Publishing Company*, 237 Pa. 333, the Supreme Court in considering the subject of exemption from taxation because of property employed in manufacturing, adopted the language of the president judge of this court, at page 337, as follows:

"It appears that the cash in bank is used in connection with the defendant's business. It represents capital stock employed

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in carrying on the business, and is incident and appurtenant thereto. It is impossible to conceive of carrying on a business without a bank account. Of course the amount of cash in bank is an important consideration when the question of exemption is claimed. If the amount is no more than is reasonably necessary, and the deposit is strictly incident to and employed in the business, it is entitled to the same exemption allowed other property actually employed. We do not mean to say that all cash in bank, to any amount, would be exempt, but so much as is essential to and actually used in the business. There is no suggestion by the commonwealth that the sum of \$50,000 in the present case is in excess of the business needs of the defendant."

Whether the defendant company carries cash in bank for the purpose of meeting its business needs or holds securities readily convertible into cash or readily acceptable as security for cash advanced can make no difference in the principle. The defendant company is entitled to carry such working fund as will enable it to meet the demands of its manufacturing business. Its officers are charged with the duty of determining how much shall be carried for the purpose.

In our opinion this case is quite similar to that of *Commonwealth vs. Dilworth Company*, 242 Pa. 194, in which it appears that the sum of \$100,000 was during several tax years held by Dilworth, Porter & Co., payable on demand as the defendant company might require it for its business purposes. Portions of it were drawn and used for these purposes during certain of the years, and it was there held that this sum was entirely exempt from taxation. In discussing this question, Mr. Justice Elkin at page 198 of the case just cited, uses the following language:

"The reports show that a certain amount of cash and current assets were on hand at the time they were made, but nothing contained therein can properly be taken to mean that this capital was not exclusively employed in the manufacturing business. The presumption is that the cash and current assets on hand were deemed necessary in conducting the business, and we have not been able to discover any evidence from which a different inference might be fairly drawn. On the other hand, it is averred in the affidavit filed by appellant, which by agreement was to be accepted as evidence in the case, that the

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\$100,000 in question was exclusively employed in the manufacturing business, and was deposited subject to check or call on like terms and conditions as if deposited in a bank."

Here the only evidence submitted to us is that of the treasurer of the company. This is uncontradicted. No attempt has been made to prove that the cash and securities stated by him to be held as the necessary working capital of the defendant during the year is inaccurate. Persons familiar with the business operations and needs of like companies could have been called to testify if this sum was not reasonably necessary for carrying on the manufacturing operations of the defendant. We have just considered this question in the case of *Commonwealth vs. John E. Stetson Company*, 546 Commonwealth Docket, 1911, in which the facts are practically identical with those in this case. The testimony in behalf of the defendant here being clear and specific, and no attempt being made by the commonwealth to show that the money and securities claimed to be exempt are not reasonably necessary to enable the defendant to carry on its manufacturing business, we are of opinion that it has been sufficiently shown that it is necessary for this purpose. If so, it is exempt from taxation. We have therefore reached the following conclusions:

1. The defendant is entitled to the exemption from taxation which it claimed at the time of the settlement.
2. The sum of \$951,528 upon which the tax was imposed by the settlement is in contemplation of law working capital actually and exclusively employed in manufacturing and is therefore exempt from taxation.
3. The settlement made against the defendant company is without authority of law.

We therefore direct that judgment be entered in favor of the defendant and against the commonwealth, unless exceptions be filed within the time limited by law.

IN RE NOMINATION PAPERS OF M. CLYDE KELLY AS CANDIDATE
OF THE NON-PARTISAN PARTY FOR CONGRESS IN THE
THIRTIETH CONGRESSIONAL DISTRICT OF PENNSYLVANIA.

Nomination of candidates—Party name.

The legislature has specifically appropriated the designation "Non-Partisan" for use on the ballot in the election of judges and second and third class city offices. To permit the same name to be used in

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nomination papers would be a violation both of the spirit **and** letter of the ballot law.

The word, Non-Partisan, cannot properly be used as a **party** name or appellation. It does not designate any party or policy, but **excludes** the idea of partisanship or party principles entirely.

Objection to nomination papers. C. P. Dauphin County, No. 57 January Term, 1915.

Wm. M. Hargest, for objections.

George Allen, for respondents.

McCARRELL, J., October 13, 1914.

By nomination papers duly filed with the secretary of the commonwealth, M. Clyde Kelly has been nominated **as** the candidate of the Non-Partisan party or policy for Congress in the Thirtieth Congressional District of Pennsylvania. A qualified elector of the district objects to the validity of these nomination papers upon the ground that the use of the name "Non-Partisan Party" is illegal and improper. That an elector is entitled to thus object has been definitely settled in Independence Party Nomination, 208 Pa. 108, in which Chief Justice Mitchell said:

"The assignment of error by the appellants that the court should have quashed the objections on the ground that the objectors were not members of the Independence party is not sustained. The objections related to putting names on the official ballot for general use. They therefore concerned **all** the electors and were open to all alike without regard to their political position."

The Ballot Law of 1893, amended at various times down to and including 1903, provided for nominations by conventions of delegates, meetings of electors, etc.

Section 4 of the act provides, as follows:

"That no words shall be used in any nomination papers to describe or designate the party or policy, or political appellation, represented by the candidate named in such nomination papers as aforesaid, identical with the words used for the like purpose in certificates of nominations made by a convention of delegates, or primary meeting of electors," etc.

The Act of July 24, 1913, P. L. 1001, is entitled,

"An act to regulate nominations and elections for all elective

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offices of cities of the second class and all offices of judge of a court of record; providing for non-partisan nominations and elections for said offices."

Section 3 of this act is as follows:

"Official primary ballots, hereinafter called 'non-partisan primary ballots' for the said offices, shall be prepared for the primary by the county commissioners, and no other ballots for such offices shall be used thereat."

The act further provides that the ballot shall be headed "NON-PARTISAN PRIMARY BALLOT" and that there shall be printed in prominent type on the back "OFFICIAL NON-PARTISAN PRIMARY BALLOT."

Section 16 of the act further provides, as follows:

"At the head of every official ballot furnished for an election at which any candidate for any office within the provisions of this act is to be voted for, there shall be printed, immediately after the instructions now by law required to be printed thereon, the following additional instructions in the same style and size of type, to wit: A CROSS (X) IN THE PARTY SQUARE IN THE FIRST COLUMN DOES NOT CARRY A VOTE FOR ANY JUDGE OR FOR (HERE INSERT NAMES OF ANY OTHER OFFICERS FOR WHICH CANDIDATES HAVE BEEN NOMINATED UNDER THE PROVISIONS OF THIS ACT). TO VOTE FOR JUDGE OR ANY CITY OFFICE MARK A CROSS (X) OPPOSITE THE NAME OF THE CANDIDATE DESIRED.

"The group of candidates for the office or the several offices within the provisions of this act shall be printed on the ballot at the head of the second column, shall be enclosed in a solid border not less than one-sixteenth of an inch in width, and shall be headed with the following words, printed in bold-face type not less than sixteen points in size: JUDICIAL AND CITY TICKET—NON-PARTISAN. Said instructions shall vary as the names of the offices to be filled may require."

Thus it appears that the legislature has used the word "Non-Partisan" to designate the office of judge and elective offices of cities of the third class. To permit the same name to be used in nomination papers would be a violation of both the letter and the spirit of the ballot law. The legislature has specifically appropriated this designation "Non-Partisan" for use on the ballot in the election of judges and second and third

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class city offices. Besides the word "Non-Partisan" cannot properly be used as a party name or appellation. It does not designate any party or policy, but excludes the idea of partisanship or party principles entirely. In an election to a non-partisan office the only question is the personal qualifications of the candidates. To permit "Non-Partisan" to be used upon the official ballot except in connection with the offices designated by law would certainly cause confusion and misunderstanding. We are therefore of opinion that the nominating petition in this case is defective because of the use of the word "Non-Partisan" to designate the party or policy of the group of electors signing the papers. If they desire to amend the name opportunity should be given so to do. Unless application for amendment in this particular is made and allowed within three days from the filing hereof, we do hereby adjudge the nomination papers in question in this case invalid and direct that the prothonotary certify this judgment to the secretary of the commonwealth.

IN THE MATTER OF THE OBJECTIONS TO DEMOCRATIC NOMINATIONS FOR REPRESENTATIVE IN THE GENERAL ASSEMBLY IN THE SEVENTEENTH REPRESENTATIVE DISTRICT OF PHILADELPHIA COUNTY.

Nomination of candidates—Substituted nominations—Political parties—Rules—Committees.

There is nothing in the Act of July 12, 1913, P. L. 709, that authorizes or recognizes the existence of a state executive committee of a political party.

The power of the state committee of a political party, with respect to rules, is limited by the provisions of the Act of July 12, 1913. Apparently this act limits the state committee to the making, altering or amending of rules for its own government.

There is nothing in the Act of July 12, 1913, that makes the state committee of a political party the sovereign power of the state organization. Party conventions are not entirely abolished. They may still be assembled to make or revise party rules, to declare party principles or to perform any other act except the nomination of candidates.

The party rules of the Democratic party in Pennsylvania, so far as the making of substituted nominations is concerned, are the rules adopted by the convention of February 26, 1908.

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The rules of the state committee of the Democratic party, adopted April 14, 1914, are at variance with the rules of the Democratic party adopted by the convention of February 26, 1908.

The right to nominate candidates for all offices, as also the right to fill vacancies in nominations, is, under our primary election laws vested in the electors of the various districts. This right remains unless some law or binding rule has transferred it to others.

There is no statutory authority and no party rule authorizing the Democratic State Committee to adopt Rule VII on April 14, 1914, and substituted nominations for representatives in the general assembly from the Seventeenth District of Philadelphia, made under the authority of that rule are invalid.

Objections to nominations. C. P. Dauphin County, No. 152 January Term, 1915.

John H. Fow, for objectors.

M. W. Jacobs and *T. Henry Walnut*, for respondents.

McCARRELL, J., October 26, 1914.

James J. Campbell and John J. Finnerty were duly nominated at the May Primaries, 1914, as candidates for Representative in the General Assembly from the Seventeenth Legislative District of Pennsylvania. On October 15, 1914, they withdrew as candidates, and on October 16, 1914, T. Henry Walnut and Wesley T. Robinson were named by the State Executive Committee of the State Democratic Committee, as substituted candidates or nominees for this office in the said district. The objections claim that these substituted nominations are wholly illegal and void, because under Rule VII of the Democratic Party of Philadelphia the power to fill such vacancies is vested in the Ward Executive Committees of the several wards constituting the legislative district. The question to be determined is whether or not the State Executive Committee has power and has been duly authorized to make these substituted nominations. The rules of the Democratic Party in the State of Pennsylvania, adopted February 26, 1908, provide in Rule VII, as follows:

"Section 1. The Democratic State Executive Committee shall have power to make and certify nominations in any Congressional, Judicial or Senatorial District whenever the party electors of the district shall have failed to make such nominations."

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On April 14, 1914, a new code of rules was adopted by the Democratic State Committee. These new rules provide in Rule VII is as follows:

"Any vacancy or vacancies happening or existing in the Democratic nomination for any office to be voted for by the electors of the entire state of Pennsylvania, and which vacancies cannot be under law filled at a proper primary election, shall be filled by the State Committee, which shall have authority to make and certify all nominations. Like vacancy or vacancies in nominations in any Congressional, Senatorial or Representative District shall be filled by the Executive Committee. Like vacancy or vacancies in any other electoral division shall be filled by the subordinate committee in whose district such vacancy or vacancies may occur.

By the rules of the Democratic Party for the city and county of Philadelphia, adopted by convention March 21, 1907, it is provided in Rule VII, as follows, to wit:

"Vacancies existing or happening on the Democratic ticket either after nominations have been made or through failure or omission to make nominations by filing nomination papers before the primary election, shall be filled as follows: In the case of county and city offices by the County Executive Committee; in the case of member of congress and state senator by the County Executive Committee on the recommendation in writing of the members of said committee from the district in which the vacancy exists or happens; in the case of state representative and delegates to state and national conventions where the district is composed of one ward, then by the Ward Executive Committee, and where the district is composed of more than one ward then by the Ward Executive Committees in the district in which the vacancy exists or happens. If more than one ward is comprised in any of the aforementioned districts in which the power to fill vacancies is lodged in the Ward Executive Committee, as above, the Ward Executive Committees concerned shall meet at some central and convenient place within the district at eight p. m. on a date to be also chosen by that one of the committees concerned which polled the largest number of Democratic votes for the Presidential electors at the last preceding Presidential election; and unless said last named Ward Executive Committee shall determine otherwise its permanent chairman shall act as temporary chairman to call said joint meeting to order.

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The Act of July 12, 1913, P. L. 709-743, is our latest legislation regulating the nomination of party candidates for public offices. This act in Section 1 (page 719), provides as follows:

"The state committee of each political party may make such rules for the government of such state committee, not inconsistent with law, as it may deem expedient; and may also revoke or alter or amend, in any manner not inconsistent with law, any present or future rules of such state committee."

The same section also provides that:

"Vacancies happening at any time in the office of state committeeman shall be filled by the city or county committeemen of the respective parties: Provided, That when said vacancy occurs in a county composed of more than one senatorial district. the members of the city or county committee embraced within the senatorial district in said county shall elect said committeeman; and when a vacancy occurs in a senatorial district composed of more than one county or part of a county, the members of the county committee embraced within said county or part of a county shall elect said committeeman."

The second section of the act (page 721) provides that:

"State committeemen, and also such party officers, including members of the national committee, as its rules provide shall be elected by a vote of the party electors, in accordance with the provisions of this act."

By Section 3 (page 721) it is further provided:

"State committeemen, and such party officers, including members of the national committee, as are required by the rules of the several political parties to be elected by a vote of the party electors, shall be elected at the spring primary, except as otherwise provided in this act."

By Section 1 (page 720) it is further provided:

"All state committeemen shall be elected by senatorial districts. Each senatorial district shall be entitled to elect two members of the state committee, except where a senatorial district is composed of more than one county or part of a county; in which event the electors residing in each county or part of a county embraced in the said senatorial district shall be entitled to elect one state committeeman. The state committeemen thus elected shall meet for organization not later than the third Wednesday following their election, at such hour and place as shall be designated by the state chairman of each respective party. The said state committeemen shall be elected

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at the fall primary in the year one thousand nine hundred and thirteen, and shall hold office until their successors are duly elected and qualified at the spring primary of the year one thousand nine hundred and fourteen; Provided, however, That where the existing rules of a party provide for the election of state committeemen by the county committeemen of the respective counties, in the year one thousand nine hundred and thirteen the state committeemen so elected shall serve until their successors are duly elected and qualified under the provisions of this act at the spring primary in the year one thousand nine hundred and fourteen. Thereafter the said state committeemen of all parties shall be elected at the spring primary.

This section recognizes the existence of city or county committees of the respective parties and entrusts the filling of vacancies in the state committee to the city or county committee of the proper district.

By Section 4 (pages 722-723) the duties of the state committee are prescribed, as follows:

"On or before the ninth Tuesday preceding the spring primary, the chairman, of the state committee of each political party herein defined to be a political party within the state shall send to the county commissioners of each county a written notice, setting forth the number of delegates and alternate delegates to the national convention of such party who are to be elected in the state at large at the ensuing primary, and the number of such delegates and alternate delegates who are to be elected at said primary in such county, or in any district of which such county forms a part. The said notice shall also set forth the number of members of the national committee, if any, who, under the national party rules, are to be elected at the said primary in the state at large, and the number of members of the state committee to be elected at the said primary in such county, or in any district of which such county or part thereof forms a part."

The same section also prescribes the duty of the chairman of a county or city committee, as follows:

"On or before the ninth Tuesday preceding the spring primary, the chairman, of the county, and, in case where a city is co-extensive with a county, the chairman of the city committee of each party, shall send to the county commissioners of such county a written notice, setting forth the names of all

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party offices within the county or city to be filled by election at the ensuing primary."

Section 17 (page 737) provides that:

"Vacancies happening or existing after the date of the primary may be filled in accordance with the party rules, as is now or may hereafter be provided for by law."

There is nothing in this act which authorizes or recognizes the existence of a state executive committee. By the rules of the Democratic Party in the State of Pennsylvania, adopted February 26, 1908, it is provided in Rule IV, as follows:

"The Democratic State Executive Committee shall consist of the chairman and secretaries of the Democratic State Central Committee and the chairman of the Democratic Division Committees, all of whom shall be ex officio members of the Democratic State Executive Committee with all the rights and privileges of such membership."

By Rule V it is inter alia provided, as follows:

The chairman of the Democratic State Central Committee thus elected shall by and with the advice and consent of the Democratic State Executive Committee conduct all state campaigns, subject to the approval of the Democratic State Central Committee. All committees hereinbefore provided for shall be subordinate to and under the control of the Democratic State Central Committee."

By Rule II of the Code of Rules established February 26, 1908, the election and organization of county committees are provided for and Clause B thereof stipulates:

"If there shall be a dispute as to who is legally elected member of any county committee or chairman or member of any city, ward or district committee, except where such members of committees shall have been elected under the provisions of the Uniform Primary Act, such dispute shall be primarily determined by the city, county or district organization under which the same shall arise."

The right of appeal from the decision of the local organization to the Democratic State Executive Committee is given. These rules of February 26, 1908, appear to have been adopted by a party convention duly assembled and are declared to be "Rules of the Democratic Party in the State of Pennsylvania." The rules of April 14, 1914, were adopted by the state committee and are stated in the caption thereof to be "Rules of the Democratic State Committee." The power of the state

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committee with respect to rules is limited by the provisions of the Act of July 12, 1913, hereinbefore quoted. Apparently this limits the state committee to the making of rules for its own government, and of revoking, altering or amending existing or future rules of the committee. By Rule II of the Code of Rules, established by the convention February 26, 1908, the right of the county committee to make rules is recognized, and by Section 3 of this rule it is provided that:

"The Democratic State Executive Committee is hereby authorized and required to examine the rules of all Democratic city and county organizations, and to either approve said rules or direct such changes as may appear necessary and expedient, and no city or county shall be entitled to representation on the Democratic State Central Committee until the rules of such committee or county organization shall have been approved by the Democratic State Executive Committee."

The rules of the Democratic party for the city and county of Philadelphia, adopted by a party convention, held March 21, 1907, provide in Rule VII as hereinbefore quoted. Apparently these rules have been approved by the Democratic State Executive Committee in accordance with Rule II as adopted by the party convention February 26, 1908, as also by Rule II of the Code adopted by the State Committee April 14, 1914, as it was conceded at the hearing that the city and county of Philadelphia has its representation on the state committee. State committees have only such authority as is committed to them by law or by the rules of the party. This has been recognized and settled in a number of cases by this court.

In *Re Meredith's Nomination*, 1 Dauphin 275, the chairman of the Republican State Committee, in order to effect a senatorial nomination in the Forty-first District appointed a person to act in conjunction with the conferees of that district in the making of a senatorial nomination, and it was held by this court that the person so appointed had no authority to participate in the conference. President Judge Simonton, at page 277, says:

"We can find nothing in the case that would warrant a decision that Mr. Rex was a legal member. It is not claimed or pretended that there is any written rule which authorized the state central committee or its chairman to appoint him a member. But it is argued that there was a custom which authorized it and a necessity which warranted it. As we have said above, we cannot find a custom in the evidence. There was no

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way of testing the right claimed prior to the passage of the Ballot Act. A candidate or faction who felt aggrieved by such intervention was obliged to choose between acquiescence or the risk of being charged with disloyalty to their party and of receiving the penalty of disloyalty. The instances since the passage of the act have been entirely too few and too different in their circumstances to crystalize into an unwritten rule. There can be no doubt that some remedy for the existing state of affairs ought speedily to be sought and applied."

The learned judge then suggested that a possible method of bringing about the necessary changes in the party rules would be the action of the representatives of the respective parties in state convention.

In the matter of Kooser's Nomination, 1 Dauphin 279, the same question was considered by the learned president judge of this court, and at page 281 he uses the following language:

"The pivotal objection to the nomination of Mr. Hicks is, that it was not made by a legally constituted conference, for the reason that the introduction of Benjamin Haywood into the conference, as a member, with power to cast four votes, was illegal, and in violation of the rules and customs of the Republican party in said congressional district. We think this objection must prevail. By the rules and usages of the party, when there is a candidate nominated at a county primary for any district office, he has the right to select the conferees from that county and the number is fixed at three from each county. There is no rule or accepted custom which provides for the appointment of conferees in any other way, or for increasing the number of conferees, either by a vote of the conference or otherwise. Therefore, waiving all question of the validity of the proceedings which resulted in an adjournment to Harrisburg, we must hold that the conference which met there was illegal, because an additional conferee with power to cast four votes was present and took part in the proceedings which resulted in the nomination of Mr. Hicks. The power to prescribe rules to govern the making of these nominations is in the people, and whatever they have not delegated remains there. They have given the right to the several candidates to appoint three conferees for each county; and have conferred upon the conferees in conference assembled the power and right by a majority of their votes to nominate a candidate, with the implied power, of course, to do everything which ordinary parliamen-

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tary usage prescribed in order to accomplish this purpose. But they have no power or authority to add to their number or to authorize any outside person to vote. The conference, therefore, in which Mr. Haywood participated was illegally constituted and its action was invalid. And it can hardly be necessary to say that this invalidity could not be cured by the subsequent adoption of a resolution to make the nomination of Mr. Hicks unanimous. Such a resolution does not import the selection of a candidate, but merely the graceful acquiescence of a minority in the will of the majority."

In *Re Templeton's Nomination*, 9 Dauphin 321, which nomination was effected after the rules of the Republican party had been amended by a state convention of the party, this court held that the additional conferees appointed by the state committee were lawful members of the conference, and that the nomination made by the conference was legal and valid.

In the matter of *Koontz's Nomination*, 9 Dauphin 323, a nomination made in pursuance of the rules of the Lincoln party was sustained, and a nomination in accordance with the rules was declared valid in an able opinion by the late Judge Capp.

In the matter of *Harmon's Nomination*, 9 Dauphin 283, a nomination by the State Executive Committee of the Democratic party was adjudged to be invalid because of the absence of authority in the committee under the party rules to make a nomination. The committee had undertaken to make the nomination under a party rule which provided that:

"All disputes or disagreements arising in any Congressional, Judicial, Senatorial or Legislative Districts in the State of Pennsylvania as to the mode or manner of making nominations therein, or as to the number of conferees or delegates in the several counties in such district shall be entitled to in the conference in such district, or upon the question of rotation, or any other matter pertaining to Democratic congressional, judicial, senatorial or legislative nominations, shall be heard and determined by the Democratic State Executive Committee."

The committee, under this rule, undertook to make a nomination and President Judge Kunkel in disposing of the objection to the validity of the nomination thus effected says at page 286:

"It is one thing, we think, to decide a disagreement or dispute about a matter pertaining to or relating to a nomination;

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it is quite another to make the nomination itself" (page 286). "The rule contemplates a dispute between the counties as such touching questions of party regulation and of the relative rights of the several counties in the conference with respect to the nomination to be made. Therefore, it provides that the decision of the committee shall conclude that the county organizations which represent the party in the counties. We can find nothing in the language used which would warrant the conclusion that the committee was to make the nomination. On the other hand, all the reasonable inferences are to the contrary. Nowhere in the rule is there any provision for notice either to the conferees who are the representatives of the candidates and of the electors of the district or to the candidates themselves. It is true, in the present case the candidates were given notice of the time and place of hearing, but such notice was purely gratuitous. The rule did not require it. It is not to be conceived that the power to make the nomination was intended to be transferred from the conferees to the executive committee without notice to the candidates, or to their conferees, those most directly interested in the nomination. And it is reasonable to presume that if the rule had been intended to cover a case commonly known as a deadlock, and in such case to empower the executive committee to make a nomination, that intention would have been explicitly expressed, and would not have been left to the uncertainty of construction. We are of the opinion that the executive committee which made this nomination was not authorized to make and certify it under the rules of the party."

The substituted nominations objected to in this case were made by the Executive Committee of the Democratic State Committee without any notice to the electors of the district. The meeting of the convention was called by a notice dated October 7, 1914, for a meeting at Harrisburg on October 16, 1914. The vacancies in the Seventeenth Representative District of Philadelphia were created by resignations or withdrawals of the duly nominated candidates on October 15th. Ten of the members of this committee of fourteen certify to the substituted nominations, and only two of the members thus certifying were residents of Philadelphia. They base their authority for making the nominations on Rule VII of the Rules of the Democratic State Committee, adopted April 14, 1914, and hereinbefore quoted. We have not been referred to any

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statute or party rule which authorizes the Democratic State Committee to adopt a rule for the filling of vacancies in Democratic nominations. The statute of July 12, 1913, gives to the state committee of each political party the right to "make such rules for the government of such state committee not inconsistent with law as it may deem expedient; and may also revoke, or alter or amend, in any manner not inconsistent with law, and present or future rules of such state committee." Thus the statute limits the right of the state committee and by necessary implication prohibits it from making any rules save those for its own government and the revocation, altering and amending of existing rules for such government. The rules of the state committee, adopted April 14, 1914, are at variance with the rules of the Democratic party as adopted by the convention of February 26, 1908, as will appear from Rule I of both organizations. Rule I of the State Committee declares that "the representative and authoritative parties of the Democratic party in Pennsylvania shall consist of

1. State Committee,
2. State Executive Committee,
3. Division Committees,
4. County Committees,

and such other subordinate committees as the rules of the respective county committees shall provide. State Executive Committee is hereinafter called Executive Committee and committees provided for by county committees are called subordinate committees."

Rule I of the Rules of the Democratic party adopted by the convention of February 26, 1908, is as follows:

"The organization of the Democratic party in the state of Pennsylvania shall consist of the following bodies,

1. Democratic Township or Precinct Committee.
2. Democratic County Committee.
3. Democratic Division Committee.
4. Democratic State Executive Committee.
5. Democratic State Central Committee.
6. Democratic State Convention."

The rules of the state committee as to the organization begin with the state committee and end with the county committee. The rules of the Democratic party begin with the township or precinct committees and end with the state convention. The rules of the committee apparently seek to make

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the state committee the controlling body with respect to the party, while the rules of the party begin with the township or precinct committees. The theory contended for at the argument in this case was that the state committee is the sovereign power in the state organization. This does not appear by anything contained in the Act of July 12, 1913. Party conventions are not entirely abolished. They may still be assembled to make or revise party rules, declare party principles, or perform any other act except the nomination of candidates which must be made by the ballot of the electors at the proper primary. Members of the state committee are to be chosen by direct vote of the people in the various election districts. The duties of the state committee as prescribed in the act are limited, as already stated, to certifying to county commissioners the number of national delegates, and the number of national committeemen to be elected at the primaries. Naturally the state committee have authority to direct state campaigns, except so far as this authority may be limited by the party rules, which confer certain rights upon city and county committees. The state committee does not appear to have been authorized to make any change in the party rules, and if we are correct in this conclusion, the party rules of the Democratic party in Pennsylvania, so far as the pending question is concerned, are the rules adopted by the convention of February 26, 1908. Rule VII has already been quoted. It gives no right to fill vacancies in nominations arising or created under any circumstances whatever. The state committee has no authority to fill a vacancy in its own number, for the Act of 1913 expressly provides that such vacancies shall be filled by the city or county committees of the district. And yet it has undertaken to authorize its executive committee to fill vacancies for nearly all the important elective offices without any conference with or notice to the electors of the district. The nominations in question here were made by this committee the next day after the vacancies were created by the withdrawal of the candidates chosen by the electors at the primaries. No notice whatever was given to the electors, or committeemen of the district, and all of the persons making these substituted nominations, save two, were non-residents of Philadelphia. This seems to be utterly at variance with the spirit of our primary election laws which reserve to the electors the exclusive right to select candidates for all offices by

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ballot. Even vacancies in the non-partisan nominations under the Act of July 24, 1913, P. L. 1009, must be effected by electors, and not by committees. The right to nominate candidates for all offices, as also the right to fill vacancies in nominations is under our primary election laws vested in the electors of the various districts. This right remains in the electors unless some law or binding rule has transferred it to others. We are of opinion that no statutory authority and no party rule authorizing the state committee to adopt Rule VII on April 14, 1914 has been shown, and that the action of the executive committee thereunder in certifying the substituted nomination now under consideration was without authority of law.

We therefore adjudge these substituted nominations and each of them to be invalid, and the prothonotary is directed to certify this judgment to the secretary of the commonwealth.

REPAIR OF PUBLIC HIGHWAYS.*Public highways—Maintenance and repair—Power of township supervisors.*

Township supervisors have no power to take wood or timber for road purposes, except by agreement with the owners or by purchase from them.

Attorney General's Department. Opinion to Joseph W. Hunter, First Deputy State Highway Commissioner.

WOLF, Third Deputy Attorney General, October 21, 1914.

This department is in receipt of your letter of October 30 requesting an opinion as to whether the Act of 13th June, 1836, P. L. 555, gives township supervisors a right of eminent domain over such timber as they may need in building causeways and bridges, or, in case of emergency, roads.

Section 27 empowers and directs township supervisors "to purchase wood, timber and all other materials necessary for the purpose of making, maintaining and repairing the public roads or highways."

Section 28 authorizes them to enter adjoining land and to "dig, gather, and carry upon said roads any stone, sand or gravel found on the same, which they may think necessary for

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the purpose of making, maintaining or repairing said roads," when they cannot buy them at reasonable prices.

Section 29 provides for the determination of the amount to be paid by the supervisors to the owner of "any materials which may be wanted for making, maintaining or repairing the roads."

It may seem odd that the legislature, having expressed in Section 27 its realization of the fact that wood and timber might be needed by the supervisors in their work upon the roads, should have limited the right of eminent domain conferred by Section 28, to stones, sand and gravel.

Such a limitation, however, seems to have been in line with a conservation policy adopted even in those early days, for an examination of the General Railroad Act of February 19, 1849, P. L. 79, shows a similar limitation of the right of eminent domain.

Section 10 of that act gives railroad companies the right to enter upon adjoining land and "to quarry, dig, cut, take and carry away therefrom any stone, gravel, clay, sand, earth, wood or other suitable material necessary or proper for the construction of any bridges, viaduct or other buildings which may be required for the use, maintenance or repairs of said railroad," and then adds the proviso that "the timber used in the construction or repair of said railroad shall be obtained from the owner thereof only by agreement or purchase."

Moreover, statutes conferring the right of eminent domain must be construed strictly (*Woods v. Greensboro Natural Gas Co.*, 204 Pa. 606, 1903; *Crescent Pipe Line Company's Petition*, 56 Superior 201, 1914), and we cannot supply the omission of the legislature even if it should seem to us to have been accidental.

You are advised, therefore, that road supervisors may not take wood or timber for road purposes except by agreement with or purchase from the owners.

So far as causeways and bridges are concerned, Section 28 of said Act of 1836 gives the "undertaker of any public bridge"—which includes the supervisors themselves, if they build it under the authority of Section 36—the right to enter adjoining lands "for the purpose of searching for and procuring the materials necessary for the building of such bridges, in like manner and with like authority as is hereinbefore provided in behalf of the supervisors of the public roads in like cases."

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As in our opinion road supervisors may not take wood or timber for road purposes by right of eminent domain, and undertakers of public bridges have only "like authority," we necessarily hold that they may not take wood or timber by right of eminent domain for bridge purposes.

IN RE JAMES THOMPSON AND M. A. HANNA AND COMPANY vs.
ERIE COUNTY ELECTRIC COMPANY.

Public service companies—Classification of service—Rates and schedules.

The complainant and the public service company had entered into a contract for furnishing service prior to the passage of The Public Service Company Law, and said contract had not expired at the time of the filing of the complaint in this case.

The complainant in this case alleged that the public service company had adopted an unreasonable and unjust classification in the schedules and tariffs filed by said company, and that by reason of said classification the complainant was compelled to pay a higher rate than other consumers under practically the same circumstances and conditions.

Held, That a public service company, in adopting classifications, is not limited to the methods of production, distribution and operating costs, but is authorized by The Public Service Company Law to take into account "the nature of, the use, the quantity, the time when used, the purpose for which used, etc.," and that the classification extends to the customer, his uses, requirements, etc.

Held, That under the facts shown by the testimony the public service company was justified in classifying its customers, and basing said classification on the varying conditions attending the service.

Public Service Commission. No. 141 Complaint Docket.

TONE and WRIGHT, Commissioners August 18, 1914.

James Thompson and M. A. Hanna and Company, co-partners, doing business under the name, style and title of "James Thompson Dock Account," filed its complaint February 5, 1914, against the Erie County Electric Company, stating that on February 24, 1911, it entered into a contract with the Erie County Electric Company for a supply of electric current for operating an Hulett Ore Unloading machine at Erie, for the period of five years from January 1, 1911, to December 31, 1915, in ac-

In re James Thompson, et al., *vs.* Erie County Electric Company. cordance with certain rates named therein; that on January 1, 1914, the Erie County Electric Company issued its "Classification, Schedule of Rates and General Information Explanatory," in which, Schedule 9, applies to the service furnished the complainant.

The complaint alleges that the tariff prescribed under said Schedule 9 was made and published for the purpose of applying to the complainants alone; that said Schedule 9 does not apply to any other person, firm or corporation served by the respondent; that the complainant is charged more for current under Schedule 9 than it would be charged if the current were furnished under Schedule 8 of said "Classification, Schedule of Rates, etc.;" that the respondent refuses to furnish the current to complainant under said Schedule 8; that the complainant has presented formal request to the respondent to cancel the contract of February 24, 1911, and return same to the complainant, and that the respondent has refused to cancel and return the said contract; that for one year the cost to the complainant for current under Schedule 9 would amount to approximately \$7,774.00, while under Schedule 8 the cost would be approximately \$2,782.37; that the respondent charges and demands from the complainant, for the services rendered, greater compensation than it charges and demands from other persons and corporations for a like and contemporaneous service under like and similar circumstances and conditions; that said charges are unjust, unreasonable and unlawful.

On February 25, 1914, the respondent filed its answer, stating that it had refused to cancel and return the said contract to the complainant unless the payment of the minimum charges as therein provided for, first be made by the complainant; and denying that Schedule 9 of its "Classification, Schedules of Rates and General Information Explanatory" was made and published for the purpose of applying to the complainants alone, and denying that said schedule does not apply to any other person, firm or corporation; and alleging that at this time the complainant is the only user of current under Schedule 9, which schedule was made to apply to an undesirable class of power business, which respondent does not care to take under Schedule 8, due to the character of the load and special conditions required to fulfill the same; that it has refused to permit the complainant to take its current under Schedule 8; that the cost to the complainant for current for the one year named in

In re James Thompson, et al., vs. Erie County Electric Company.

the complaint, under Schedule 9, was \$7,774.00, and that under Schedule 8 its cost would have been approximately \$6,584.88; that the respondent first entered into a contract to supply electric current to the complainant on November 5, 1907, for a term of four years from January 1, 1908, to December 31, 1911, in which contract the minimum yearly payment was \$7,000.00; that at the request of the complainant the said contract was cancelled by the execution of the present contract on February 24, 1911, in which the minimum charge per year was fixed at \$3,000.00; that owing to fluctuations in voltage due to wide variations in the current used in operating the Hulett Unloader, a separate transmission line and a reserved amount of generating apparatus at the power station are required for the service; and denying that it charges and demands from the complainant for the services rendered, greater compensation than it charges and demands from other persons and corporations for a like and contemporaneous service under like and similar circumstances and conditions; and denying that the said charges are unjust, unreasonable and unlawful.

Both parties to the complaint, on April 21, 1914, in accordance with notice from the Commission, presented legal arguments, cited authorities and later filed briefs "upon the power of the Commission to inquire into the reasonableness of the rate, in view of the fact that the contract stipulating the rate was entered into prior to the enactment of The Public Service Company Law on July 26, 1913."

Counsel for both parties though differing as to the source of the Commission's authority over the method of enforcement of its order relative to any change in the rates in this contract by reason of its antedating the enactment of The Public Service Company Law, admitted and agreed that the Commission had power to inquire into the reasonableness of the rates named in the contract between the two parties, and to regulate such rates if it should find the same unreasonable, notwithstanding the fact that the contract was entered into prior to July 26, 1913.

Thereupon a hearing was held May 22, 1914, upon the complaint as to the unreasonableness of the rates in the said contract.

From the testimony presented, the following facts are found:

The Erie County Electric Company, on November 5, 1907, entered into a contract for a term of four years, with James

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Thompson, of Erie, Pa., and M. A. Hanna and Company, of Cleveland, Ohio, operating the Philadelphia and Erie Ore Dock, agreeing to install an engine and generator of 500 kilo watt capacity, to be maintained and operated for supplying electric service to the ore dock, erect the necessary transmission lines; and furnish and deliver at said ore dock during the season of navigation, defined as from April 1st, to December 25th of each year, 3 phase, 60 cycle, alternating current at 2,300 volts, for operating a Hulett Ore Unloading Machine, used in unloading and transferring iron ore from vessels at, to cars on, said ore dock. The contract provided that the customer was to pay the electric company for electric current delivered at the ore dock at the rate of four cents per kilo watt hour and that the payments in any one year were to be not less than \$7,000.00. In the fall of 1910, James Thompson requested a modification of the terms of the contract, and a new contract between the same parties was entered into February 24, 1911, for a term of five years, beginning January 1, 1911, and ending December 31, 1915. This contract provided that the customer was to pay the electric company for electric current delivered at the ore dock at the rate of four cents for the first 100,000 kilo watts used, and three cents for the next 40,000 kilo watts used, and two cents for all current used in excess of 140,000 kilo watt hours in any one season of navigation; that the payments in any one year were to be not less than \$3,000.00, and that the contract of November 5, 1907, "is hereby cancelled." During the years 1911, 1912 and 1913 the current was furnished under the terms of the contract of February 24, 1911. The amount of current furnished each year and the payments made were as follows:

<i>Year.</i>	<i>Amount of Current.</i>	<i>Payments.</i>
1909, ...	226,400 K. W. Hours, ...	\$9,056.00
*1910, ...	95,340 K. W. Hours, ...	*3,813.60
1911, ...	98,150 K. W. Hours, ...	3,926.00
1912, ...	181,000 K. W. Hours, ...	6,020.00
1913, ...	268,700 K. W. Hours, ...	7,774.00

*Plus \$3,186.40 to make up the minimum of \$7,000.00.

On January 1, 1914, the Erie County Electric Company published its schedule of tariffs and rates, among which are two, Schedules 8 and 9, which are the occasion and form the basis of this complaint. Copies of said Schedules 8 and 9 are given in Appendix sheets I and II herewith. The Erie County Elec-

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tric Company generates practically its entire output of electric current at one power station, and the current furnished to the ore dock now comes generally from the same generators and switchboard as current furnished to its other power customers. The Erie Lighting Company, a competitor of the Erie County Electric Company since 1912, has offered to furnish the electric service required at the ore dock for the Hulett Unloader, under its Schedule "D," which is the same as Schedule 8 of the Erie County Electric Company. Copy of said Schedule "D" is given in Appendix sheet III herewith. Ore unloaders at other Lake Erie ports are operated by electric current produced by the operators of the unloaders, except at Buffalo, where James Thompson operates another ore dock, having thereon a Hulett Unloader, two five-ton Brown unloaders, a centrifugal pump, and a system of electric lights, and secures the electric current for operating all of said apparatus from the Furnace Company at the flat rate of \$400.00 per month for twelve months per year.

The allegations of the complainant that Schedule 9 applies to no other customer of the respondent, that complainant is charged more under Schedule 9 than it would be under Schedule 8, and that the respondent refuses to furnish the service under Schedule 8, are admitted by the respondent; and the respondent also admits its refusal to cancel the said contract, with the offer however, to do so, provided the minimum payments due thereunder be made to it by the complainant. This matter of cancellation of the contract is one that this Commission has no authority over.

The other allegations of the complaint are—that Schedule 9 was made and published for the purpose of applying to the complainant alone, and that for one year the cost to complainant for current under Schedule 9 was \$7,774.00, while under Schedule 8 it would have been \$2,782.37, and as therefore the respondent charges complainant more than it charges other customers for like and contemporaneous service under like and similar conditions and circumstances, such charges are unjust, unreasonable and unlawful.

As bearing upon the reasonableness of the rates, the testimony given, that the Erie Lighting Company offered to furnish the same service under its Schedule "D," and that the charges for current at the ore dock at Buffalo amount to a flat rate of \$400 per month, furnish no intelligent or proper com-

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parison to the rates complained of, for the reason that no testimony was given nor data secured as to what the maximum demand or its resulting "demand" charges would be under and as provided in said Schedule "D," nor what was the amount of current used or amount of work performed at Buffalo as compared to Erie.

The complainant established and emphasized the fact that the electric current it received, is a part of the same current, produced at the same time, in the same place, by the same generator, and at the same cost per kilo watt for production, as is the current furnished to and "produced for the vast number of other power customers" of the respondent.

Is it lawful then for the respondent to charge the complainant a rate different (be it more or less) from what it charges other power customers? Is Schedule 9 reasonable and lawful in itself, and in its application to the complainant, and are the rates therein just, reasonable and lawful?

The Public Service Company Law enacted July 26, 1913, provides in Article III, Section 1: "It shall be lawful for every public service company—"

"(a). To demand, collect and receive fair, just and reasonable prices, rates, fares, tolls, charges, or other compensation, for each and every service rendered, or to be rendered by it, to any person or corporation, or to any other public service company with whom it interchanges facilities or services."

"(b). To employ in the conduct and management of its business, suitable and reasonable classifications of its service, patrons and rates; and such classifications may, in any proper case, take into account the nature of, the use, and quantity used, the time when used, the purpose for which used, the kind, bulk, value, and facility of handling commodities, and any other reasonable consideration."

and in Article III, Section 8—"It shall be unlawful for any public service company—"

"(a). To charge, demand, collect or receive, directly or indirectly, by any special rate, rebate, drawback, abatement, or other device whatsoever, from any person or corporation, for any service rendered or to be rendered, a greater or less compensation or sum than it shall demand, charge, collect, or receive from any other person or corporation for a like and contemporaneous service under substantially similar circumstances and conditions."

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From the above, it is evident that the classification authorized is not limited to the methods of production, distribution and operating costs of the producer, but is authorized to be applied to "the nature of, the use, the quantity used, the time when used, the purpose for which used, etc.;" and that the "classification" extends to the customer, his uses, requirements, et cetera. Under such enactment it is proper and lawful for the respondent to classify its power customers.

Examination of the testimony and exhibits, shows that among the respondent's power customers, the complainant has the lowest monthly current consumption for two, three or four months of the year, and then for five, six or seven months is the fifth highest consumer of current for power; and, that the complainant's total annual current consumption has a wide and irregular variation, being for the years 1909, 1910, 1911, 1912, 1913, respectively 226,400, 95,340, 98,150, 181,000 and 268,700 K. W. hours.

It has long been recognized in the manufacture of electricity that irregularity in the current demands of a customer results in the least desirable class of business, owing to the necessity of making provision for furnishing sufficient service at the times of greatest requirements for same, and then having a greater or less portion of the power station equipment idle at other times, when the customer has no need of the full amount that provision has been made for. Another difficult service to maintain is where the requirements are subject to sudden and recurring wide fluctuations. In such cases unusual precautions and provisions are required at the generating station to prevent the variable demands of one customer, unless served from an individual generator, affecting adversely the regularity of the voltage and current furnished to all the other customers. The evidence as to such fluctuations in the current required for the unloader of the complainant is limited to the statement of T. W. Thomas, electrician. (Page 156.)

"Last Tuesday, the 19th, I got down to the dock early, and I observed the A. C. Ammeter for five hours steady. The lowest reading we observed was $32\frac{1}{2}$ amperes at 2,300 volts, the highest, I just got one peak of 50 amperes, two peaks of 49 amperes, and the balance ran along 42 amperes."

And, respondent's exhibit 7, which chart is without data as to the exact interval of time covered, and from which no definite comparisons can be made. It does indicate, however, a

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considerable and recurring fluctuation in the current requirements at the ore dock, and as in addition, the complainant uses but a small amount of current for two to four months per year, and then a very much larger quantity (200 to 400 times as much) during the "season of navigation;" and also with a large variation in the quantity of current required from year to year, it is the opinion of the Commissioners that a classification covering such service, and the service rendered to the complainant, is proper and lawful.

In considering the reasonableness of the rate, the complainant maintains that the rate charged, results in it being required to pay a larger amount per year for its current than if it were to receive current under Schedule 8; or were to receive current from the Erie Lighting Company under its Schedule "D," and fixes the amount of excess charge at about \$4,991.00 for the year. This is an error owing to the complainant entirely ignoring the amount accruing under the item of "Maximum Demand" charges provided for in Schedule 8; and in connection with other evidence tends to indicate a question whether the complainant clearly understands the terms and conditions of Schedule 8 and their application. The respondent states that under Schedule 8 the annual charge would be approximately \$6,584.88, and in Exhibit "E" of its answer gives an estimated "Maximum Demand," but neither party ever had any data therefor. An examination of complainant's Exhibit "C"—being a list of a large number of respondent's power customers receiving current under Schedule 8—shows that a customer's total monthly consumption divided into his total monthly payment for any one month gives "an average monthly rate" materially different from his average monthly rate (thus figured) for other months; the variation in such "average monthly rate" being material and ranging in cases from 2.2 to 2.71 cents per K. W. hour; and, inasmuch as the energy charge is uniform each month, is due entirely to variation in the "Maximum Demand" and the charges therefor. Further examination of complainant's Exhibit "C" indicates that some of the respondent's power customers receiving service under Schedule 8 are paying a higher average rate per K. W. hour, and others a lower average rate than is complainant; and that the average rate is different for each customer served under Schedule 8, depending upon the consumption and a monthly variable,—the customer's maximum demand. From this it is

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evident that definite data of the maximum demand must be secured before any proper comparison of charges under Schedule 8 can be made. Assuming the respondent's *estimated* "Maximum Demand" to be approximately correct, the average resulting rate per K. W. hour for current furnished the complainant under Schedule 9 is somewhat greater than it would be under Schedule 8.

As the average rate per K. W. hour to power customers served under Schedule 8 varies for each customer monthly, and varies also as between different customers and as the average rate for the complainant under Schedule 9 is not considered unreasonably higher than it would be under Schedule 8; and as the respondent is considered entitled to a separate classification for the service rendered to the complainant, it is the opinion of the Commission after consideration of all the circumstances, that the rates named in the respondent's Schedule 9 of its "Classification, Schedule of Rates, etc.," are not unjust, unreasonable nor unlawful, and it accordingly directs that the complaint be dismissed.

APPENDIX I.

ERIE COUNTY ELECTRIC COMPANY. Schedule. 8.

Power Rate.

Wholesale Raw Current Service.

For not less than 7½ Horse Power.

Schedule of rates for power by alternating 3 phase, 60 cycle, 2,300 volts or over. Raw current, when customer provides transformer, or takes current at 2,300 volts, or over.

MAXIMUM DEMAND.—\$1.00 per Kilo Watt per month.
Energy Charge:

For all

over 250,000 K. W. Hrs. per mo. at .0085c.	per K. W. Hr.
For 160,000 K. W. Hrs. per mo. at .009 c.	per K. W. Hr.
For 80,000 K. W. Hrs. per mo. at .0096c.	per K. W. Hr.
For 40,000 K. W. Hrs. per mo. at .0099c.	per K. W. Hr.
For 20,000 K. W. Hrs. per mo. at .0105c.	per K. W. Hr.
For 10,000 K. W. Hrs. per mo. at .01125c.	per K. W. Hr.
For 5,000 K. W. Hrs. per mo. at .012 c.	per K. W. Hr.
For 3,000 K. W. Hrs. per mo. at .015 c.	per K. W. Hr.

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For 2,000 K. W. Hrs. per mo. at .018 c. per K. W. Hr.

For 1,000 K. W. Hrs. per mo. at .0225c. per K. W. Hr.

For less than 1,000 K. W. Hrs. per mo. at .03 c. per K. W. Hr.

(All kilowatt hours consumed between each range to be charged at next lowest rate.)

Maximum Demand.—On 15 kilo watt installation or over, the demand shall be measured by a Maximum Demand Meter indicating for each separate service taken as a unit the monthly maximum demand; but, the aggregate quantity of current used of such separate services (where there are separate service) shall be charged at the lowest rate for energy charge resulting from addition of all such separate services.

Minimum Monthly Charge.—\$15.00.

Discount.—Less 5 per cent. for payment on or before 10th day of each month.

Motors.—All alternating Current Motors larger than 40 H. P. in capacity shall be Synchronous Motors.

Transformers.—The company will provide transformers for Wholesale Raw Current Customers for a rental of ten per cent. per year of cost of transformers, to be paid in monthly installments. The company reserves the right to specify the size of transformers to be used on rental basis.

APPENDIX II.

ERIE COUNTY ELECTRIC COMPANY. Schedule 9.

Power Rate.

Season of Navigation Service.

Schedule of rate of power by alternating, 3 phase, 60 cycle, 2,300 volt, or over, raw current, when customer provides transformer, or takes current direct without transformer, and uses the current at irregular intervals during the season of navigation, and occasionally before and after navigation, if required.
For first .. 100,000 K. W. Hrs. per season @ 4c. per K. W. Hr.
For next .. 40,000 K. W. Hrs. per season @ 3c. per K. W. Hr.
For all over 140,000 K. W. Hrs. per season @ 2c. per K. W. Hr.

Minimum Season Charge.—\$4,000.00.

Discount.—None.

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APPENDIX III.

ERIE LIGHTING COMPANY.

Schedule D.

High Tension or Wholesale Power Rate.

Available for all consumers using the company's 2,200 volt, 3 phase, service for power purposes. Consumers having a connected load of at least fifty horsepower may supply themselves with light from this power service to an extent not exceeding twenty per cent. of the total connected load.

RATE.

Demand Charge \$1.00 per K. W., maximum demand per month.

Energy charge as follows:

For 250,000 K. W. Hrs. per mo. or more,	\$.0085 per K.	W. Hr.
For 160,000 K. W. Hrs. per mo.	.009 per K.	W. Hr.
For 80,000 K. W. Hrs. per mo.	.0096 per K.	W. Hr.
For 40,000 K. W. Hrs. per mo.	.0099 per K.	W. Hr.
For 20,000 K. W. Hrs. per mo.	.0105 per K.	W. Hr.
For 10,000 K. W. Hrs. per mo.	.01125 per K.	W. Hr.
For 5,000 K. W. Hrs. per mo.	.012 per K.	W. Hr.
For 3,000 K. W. Hrs. per mo.	.015 per K.	W. Hr.
For 2,000 K. W. Hrs. per mo.	.018 per K.	W. Hr.
For 1,000 K. W. Hrs. per mo.	.0225 per K.	W. Hr.
For less than 1,000 K. W. Hrs. per mo.	.03 per K.	W. Hr.

Prompt payment discount, 5 per cent.

Maximum Demand.

By maximum demand is meant the largest amount of power used for a period of five minutes during the month. This is determined or measured by a maximum demand meter or meters. On installations of 15 KW or less, the maximum demand will be taken as seventy-five per cent. of the transformer capacity.

Minimum monthly charge under this schedule is \$15.00.

Transformers.

The consumer may provide his own transformers or the company will provide and maintain transformers under this schedule at a rental of ten per cent. per year of the cost of the transformers.

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former, payable in monthly payments. The company reserves the right to specify the size of transformers to be used.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, August 18, 1914, it is ordered, that the complaint in this proceeding be, and it is hereby dismissed.

EDWARD J. METER vs. METROPOLITAN ELECTRIC COMPANY.

Public service companies—Electric current—Rates.

The public service company, in its schedules and tariffs filed and posted, quoted one rate for current furnished for light and a different rate for current furnished for power, and required the consumer to permit the company to install separate meters to measure each service where they were being used in the same premises. To this practice the complainant objected.

Held, That the practice of the public service company was just and reasonable, and, there being no evidence to show that the rates charged were unreasonable or unjust, that the complaint should be dismissed.

Public Service Commission. No. 246 Complaint Docket.

TONE, Commissioner, September 1, 1914.

On June 30, 1914, Edward J. Meter, of the city of Reading, made a complaint to the Commission that under the practices of the Metropolitan Electric Company he was compelled to install at his place of business in said city, two meters to measure the electric current used by him in the premises and to enter into two contracts,—one known as a power contract and the other as a light contract, the minimum rate under each contract being different.

At the hearing it appeared that the complainant was using the current furnished by the respondent for two purposes, to wit: for lighting his house and for operating a motor used in

Edward J. Meter *vs.* Metropolitan Electric Company.

connection with an X-ray machine. The respondent insisted that under the tariffs and rules and regulations filed by it with the Commission, and posted according to law, the complainant was required to install two meters—one to be used for measuring the current consumed in lighting the house, and the other for measuring the current consumed in operating the motor. The testimony of the witnesses produced and an examination of the schedules and tariffs of the company on file, show that the respondent has established separate rates for each of the services mentioned, and there was no testimony produced to show that the rates established are not just and reasonable.

It appearing to the Commission therefore, that the rates and practices of the respondent in this instance are just and reasonable, it is hereby directed that an order be entered dismissing the complaint in this case.

ORDER.

This case being at issue on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, September 1, 1914, it is ordered, that the complaint in this proceeding be and it is hereby dismissed.

COMMONWEALTH *vs.* E. M. BIGELOW, STATE HIGHWAY COMMISSIONER, GEORGE C. LANGENHEIM, DISTRICT ENGINEER, S. A. FOSTER, CHIEF ENGINEER AND CHARLES E. STERNER, DISTRICT SUPERINTENDENT.

Criminal Law—Indictment—Sufficiency—Act of May 31, 1911.

Under the Act of May 31, 1911, P. L. 468, the state highway commissioner is given discretion in the work of maintenance and repair of state highways. The highways are not to be repaired immediately, but the work of construction, maintenance and repair is to be commenced and carried on as equally and uniformly in the several counties as conditions will allow.

One most important condition in the maintenance and repair of high-

Commonwealth vs. E. M. Bigelow, State Highway Commissioner, et al. ways, under the Act of 1913, is a sufficient appropriation; and if the legislature failed to provide such appropriation the state highway commissioner could not proceed with the work.

An indictment charging the state highway commissioner with failure to keep a certain highway, described in the Act of May 31, 1911, in safe, convenient and complete repair, but which does not allege that the legislature has provided an appropriation sufficient for the purpose, is defective.

The state highway commissioner has not been given the same powers as supervisors over township roads. He is limited in his expenditures to the appropriations made by the legislature, and has no power to create any liability against the state for the maintenance of highways.

A mistake in the exercise of discretion given to a public officer does not render him liable to indictment.

Motion to quash indictment. Quarter Sessions of Dauphin County, No. 101, June Sessions, 1914.

C. A. Whitehouse, District Attorney of Schuylkill County, for plaintiff.

John C. Bell, Attorney General, and *Wm. M. Hargest*, Second Deputy Attorney General, for defendants.

McCARRELL, J., November 12, 1914.

This indictment charges the defendants, as state highway commissioner and officers of the State Highway Department of Pennsylvania, with neglecting and refusing to maintain in safe, convenient and complete repair a certain highway in Schuylkill County leading from the Borough of St. Clair in said county to the Borough of Frackville in said county, embracing that portion of the said road between Arch and New-castle Township and the head of the grade near Frackville in said county. The indictment alleges that this neglect extended from March 1, 1913, until the finding of this indictment on September 6, 1913. The defendants being charged as statutory officers of the commonwealth of Pennsylvania, recourse must be had to the Act of Assembly under which they were appointed to ascertain their powers and duties. This is the Act of May 31, 1911, P. L. 468-533. The sixth section of this Act (p. 472), provides as follows:

"From and after the adoption of this act, all those certain existing public roads, highways, turnpikes, and toll-roads, or

Commonwealth vs. E. M. Bigelow, State Highway Commissioner, et al. any parts of portions thereof, subject to the provisions herein-after made in the case of turnpikes and toll-roads, forming and being main traveled roads or routes between the county seats of the several counties of the commonwealth, and main traveled roads or routes leading to the state line, and between principal cities, borough and towns, shall be known, marked, built, rebuilt, constructed, repaired and maintained by and at the sole expense of the commonwealth; and shall be under the exclusive authority and jurisdiction of the State Highway Department, and shall constitute a system of state highways, the same being more particularly described and defined as follows:

Route 161 (p. 493). "From Pottsville to Sunbury—Commencing in Pottsville, and running by way of Frackville, Fountain Springs and Ashland to a point on the dividing line between Schuylkill and Columbia counties; thence by way of Centralia to a point on the dividing line between Columbia and Northumberland counties; thence by way of Mount Carmel, Shamokin, Paxinos and Stonington, by way of Old Centre Pike, into Sunbury, Northumberland County."

This Route 161 covers the road which is complained of in this indictment. It is part of the system of state highways. The state must bear the sole expense of maintaining and keeping it in repair. The state highway commissioner is the officer appointed to have charge of the state highways, and section 5 (p. 471) provides, as follows:

"The work of maintenance, repair and construction of said state highways shall be commenced and carried on as equally and uniformly in the several counties as conditions will allow."

Thus it appears that the state highway commissioner is given discretion in regard to the work of maintenance and repair of state highways. The highways are not to be repaired immediately, but the work of construction, maintenance and repair is to be commenced and carried on as equally and uniformly in the several counties as conditions will allow. By the act under which the state highway commissioner is appointed 296 different routes of highways are made state highways. Their length is over 8,000 miles. Previous to the approval of this act these highways were under the control of the various municipalities in which they were located and the duty of maintaining and repairing the same was not upon the commonwealth. The legislature understanding that this large

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amount of state highway mileage could not immediately be put in repair, charged the state highway commissioner with the duty of carrying on the work of maintenance and repair as equally and uniformly in the several counties as conditions will allow. One most important condition as to the making of repairs is a sufficient appropriation to cover the expenses, and if the legislature has failed to provide a sufficient sum for the making of all needed repairs this condition would not allow the state highway commissioner to proceed with this work. He is given no power to borrow money or fix the commonwealth with any liability for money expended in the repairing of state highways. He is limited to such sums as the legislature may, by appropriation duly made, provide for that purpose. There is no allegation contained in this indictment that the legislature has provided the state highway commissioner with an appropriation of sufficient money to make the repairs which the indictment alleges the defendants have neglected or refused to make. In the absence of such allegation it does not appear that the state highway commissioner has failed in the performance of his duty to repair. If the indictment contained an averment that the legislature had by appropriation provided sufficient money to enable the state highway commissioner to make the repairs referred to in the indictment, and that he had wilfully neglected and refused to perform the duty of repairing, a very different case would be presented. It is proper here to observe that the indictment does not charge the defendants with wilfully or unlawfully neglecting and refusing to keep the road in question in safe, convenient and complete repair, and for this reason alone the sufficiency of the indictment might perhaps be questioned. The duties of the state highway commissioner and the other state officers named therein as defendants are very different from those imposed upon the supervisors of townships. Supervisors are required to keep the highways of their districts in safe and proper condition for public use, and in order that this duty may be performed at all times and under all circumstances, they have power to levy taxes and when an emergency arises have power to borrow money upon the credit of the municipality. Supervisors, therefore, can properly be indicted when they wilfully neglect or refuse to perform their lawful duty, but the officers of the State Highway Department, as already stated, have no power to levy taxes, borrow money, or procure the doing of

Commonwealth vs. E. M. Bigelow, State Highway Commissioner, et al. work upon the credit of the state. The state highway commissioner is limited to the proper expenditure of such money as the legislature has appropriated for his uses. He is, therefore, clothed with the discretion to proceed with the work of maintenance and repair as equally and uniformly in the several counties as conditions will allow. While the indictment names the defendants as statutory officers under the statute creating the highway department, it does not specifically set forth the duties imposed by the statute upon the defendants, respectively, and for this reason it is defective: Sadler on Criminal Procedure, section 212; 2 Wharton C. L. 9th Ed. Sec. 1486.

The learned district attorney of Schuylkill County in his brief filed in opposition to the pending motion suggests that the state highway commissioner is given, by section 11 of the Act, the same powers as are possessed by supervisors of townships. This section (p. 518) does give him in terms the rights and powers conferred by existing laws upon supervisors or commissioners in townships in the construction or maintenance of township roads. This clause, however, must be construed in the light of other provisions of the section and of the said act. Another provision of this section is, as follows:

"The expense of the construction, improvement and maintenance of state highways provided for in this act when properly certified by the state highway commissioner shall be audited by the auditor general, and when audited and allowed shall be paid out of the money specifically appropriated for this purpose by warrant drawn therefor by the auditor general upon the state treasurer."

This provision declares that the expense of the construction, improvement and maintenance of state highways shall be paid only out of money specifically appropriated therefor, and does not give the state highway commissioner any power to create a liability against the state for the maintenance of highways.

The Act of May 11, 1909, P. L. 519, makes it a misdemeanor for the state treasurer or any officer of the commonwealth to pay any money out of the state treasury, or authorize the payment of any money therefrom, except in accordance with a specific appropriation therefor, so that it is impossible to procure payment of any money for the maintenance or repair of highways without a specific appropriation. It is clear, therefore, that the state highway commissioner has not been given the same powers as supervisors of township roads, and

Commonwealth vs. E. M. Bigelow, State Highway Commissioner, et al. that he is limited in the expenditure of money for the maintenance and repair of roads and can only disburse appropriations as equally and uniformly in the several counties as conditions will allow.

In *Graffins vs. Commonwealth*, 3 P. & W. 502 (1832) it was held that highway commissioners were not indictable for neglecting to repair a borough street because the borough council had not provided the money necessary therefor.

In *Commonwealth vs. Johnson*, 134 Pa. 635, and in the case of *Roaring Creek Township Road*, 140 Pa. 632, supervisors were held liable for failure to build a bridge and repair a road because they had the power of taxation and did not offer to show that they had exhausted it.

We are of opinion, therefore, that the indictment does not contain the necessary averments to charge the state highway commissioner with the duty of repairing the road in question, and does not disclose any wilful or unlawful neglect of any duty belonging to his office. The chief engineer, district engineer and district superintendent named in the indictment are by the terms of the statute subject to the order of the state highway commissioner, and it does not appear from any allegation in the indictment that they have any other or greater power than the state highway commissioner himself, and if he is not liable under the present indictment to answer for a criminal neglect of duty, the other defendants cannot be held to respond.

In *Commonwealth vs. Thompson*, 126 Pa. 614, the commissioners of roads and highways were indicted for refusing to lay out a public road upon written request, the indictment charging that the defendants deemed the road necessary for the accommodation of the public. The indictment was quashed and on appeal to the Supreme Court the action of the lower court was sustained, the court using the following language:

"The refusal of the defendants to lay out this road is conclusive of the fact that they did not deem it necessary. That the commissioners have a discretion in this matter is too plain to need argument, that they exercised this discretion is equally clear. If we concede that their discretion was not wisely exercised they must not be punished for their error by indictment and conviction as criminals."

In the present case it is clear from the terms of the Act of May 31, 1911 that the state has assumed all responsibility for

Commonwealth *vs.* E. M. Bigelow, State Highway Commissioner, et al. the maintenance and repair of the state highways of which the road in question here is one. A highway commissioner has been appointed to direct and secure the necessary maintenance and repair but he can conduct his work only when and as appropriations are made for the expense thereof and by the fifth section of the act he is given discretion and charged with the duty of commencing and carrying on the work of maintenance and repair as equally and uniformly in the several counties as conditions will allow. This vests in the commissioner a large discretion and even for a mistake in the exercise of it he would not be liable to indictment. In many other particulars the commissioner is permitted to exercise his own discretion.

From an agreement as to facts presented at the hearing of the pending motion it appears that the highway commissioner has expended upon Route 161, in question here, from May 2 to September 1, 1913, \$279 per mile, while on all the routes in Schuylkill County embraced in District No. 5 he expended during the same time only \$189.99 per mile. The average expenditure per mile upon the route in question here is largely in excess of the average amount per mile spent upon all the state highways which are either wholly or in part in Schuylkill County. Apparently the discretion of the commissioner in equally and uniformly maintaining and repairing the highways has not been exercised to the disadvantage of the particular route in question here. This, however, we do not regard as of controlling importance in disposing of the pending motion.

The questions raised by the pending motion to quash are substantially the same as were those raised under a similar motion in the case of Commonwealth *vs.* Bigelow, et. al., in the Court of Quarter Sessions of Northumberland County, in which case President Judge Cummings in an able and elaborate opinion sustained the motion and quashed the indictment.

The commonwealth of Pennsylvania in its sovereign capacity has assumed the duty of maintaining and repairing the several state highways described in the Act of May 31, 1911, *supra*, and the highway commissioner and those indicted here with him are agents of the state, and in our opinion they are not charged in this indictment with any criminal neglect of duty, and no criminal conduct is disclosed by the averments of the indictment. The motion to quash is therefore sustained and the indictment is accordingly quashed.

ESTATES OF GEORGE A. WHITESIDE, DECEASED, AND MARGARETTA P. WHITESIDE, DECEASED.

Decedents' estates—contracts of decedents—Specific performance.

A lease of real estate for a term of five years included an option to purchase within the term. It also provided that if lessee should hold over after the expiration of the term mentioned the contract should continue in force for another term of five years. Lessee held over and lessors executed a supplementary agreement waving all question as to the extension of the option. Lessors died within the second term of five years. Lessee gave verbal notice to their executor of his intention to exercise his option and conveyance was refused. He afterwards gave written notice within the extended term and conveyance was refused. Lessee had complied with all the conditions of the lease, had paid a paving lien against the property and had expended money to adapt it to his business. *Held*, that lessee was entitled to a decree for specific performance of the contract to convey which became complete upon the exercise of his option.

When it is shown that grantors in a lease with option to purchase did not hold the entire title to the property leased, and the grantee, after exercising his option, is willing to accept a conveyance the part owned by them, conveyance may be so decreed, subject to a proportionate reduction of the purchase money.

If the widow of a grantor in a lease with option to purchase was not a party to the contract, no decree of specific performance can be made as to her; but if the grantee is willing to accept a conveyance subject to her dower rights, conveyance may be so decreed.

Orphans' Court of Dauphin County. Petition for specific performance of contract.

Edwin W. Jackson, for petitioner.

Wolfe & Bailey, for respondent.

MCCARRELL, J., November 12, 1914.

On July 17, 1913, Henry A. Gable presented his petition alleging that George A. Whiteside and Margaretta P. Whiteside on April 23, 1901, made with him an agreement in writing by virtue of which he became entitled to a conveyance in fee simple of a lot of ground at the corner of South Second Street and Cherry Street, in the city of Harrisburg, upon the payment of the purchase money. He alleged that he had partially

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performed his part of the contract, was ready to pay the remainder of the purchase money and requested that an order be made requiring the conveyance to him of the land in question, in accordance with the terms of said contract. An answer was filed practically admitting all the essential facts alleged in the petition, but denying the petitioner's right for various reasons to a specific performance of the contract. A proceeding had been commenced by the petitioner against these respondents to No. 465 Equity Docket in our Court of Common Pleas, in which the testimony had been taken fully and a decree entered, but which decree and proceeding were reversed by the Supreme Court in 242 Pa. 188, upon the ground that the Orphans' Court had sole jurisdiction to enforce specific performance of the contract in this case, two of the parties to the contract having died. At the hearing upon this petition the record in the equity case was offered in evidence. The testimony taken in that proceeding together with the additional testimony of Henry A. Gable, the petitioner, constitutes the testimony in this proceeding. From this we find the following

STATEMENT OF FACTS.

On April 23, 1901, George A. Whiteside and Margaretta P. Whiteside, being the owners of a tract of land eighty by ninety-five feet, generally known as 113, 115 and 117 South Second Street, Harrisburg, Pa., leased the same to Harry A. Gable, the petitioner, for a term of five years from May 20, 1901. The rent was \$525 per annum, payable in monthly installments, and all taxes and municipal charges whatsoever during the said term. The petitioner as lessee was also bound to keep all buildings then upon the premises, or afterwards erected, insured in the sum of \$1,000.00 for the benefit of the lessors. This contract of lease grants the petitioner "an option to purchase the said premises for the sum of \$10,500.00; this option to last during the tenancy of the term of this lease, and the said option, if it should result in an agreement between the parties hereto for the sale of the said premises for the said sum, evidenced by an agreement in writing, then from the date of the said agreement the rent is to cease, and the rent hereinabove mentioned to be payable up to the date when the agreement for the sale of the said premises shall be put in writing as aforesaid." The lease contains this further stipulation: "It is hereby agreed that if the above named Henry A. Gable should

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continue on the above described premises after the termination of the above contract then this contract to continue in full force for five years from May 20, 1906." A supplementary agreement attached to this contract, and signed by George A. and M. P. Whiteside, under date of March 29, 1906, is as follows, viz: "It is understood and agreed to by us that we waive any question as to the foregoing agreement giving H. A. Gable the option to purchase the property for \$10,500.00 any time during the ten years from date of this lease." Thus it appears that the plaintiff acquired an optional right to purchase the premises at the price named at any time on or before May 20, A. D. 1911.

George A. Whiteside, one of the lessors, died July 27, 1908, and Margaretta P. Whiteside, the other lessor, died September 17, 1908.

George A. Whiteside by his will devises to his wife, Kate C. Whiteside "a one-third interest of my estate for life in my property at northeast corner of Second Street and Cherry Street, known as 113, 115 and 117 South Second Street, Harrisburg, Pa." In case of the sale of said property either before or after his death he directs "one-third of the purchase money to be secured on said property by mortgage for the benefit of my said wife during her lifetime, the interest to be paid to her as provided for in said mortgage."

Margaretta P. Whiteside (unmarried sister of George A. Whiteside) by her will, leaves to her three nephews, George A., John E., and Harry I., all her "interest in the property 113-117 South Second Street, Harrisburg, to share alike."

Harry I. Whiteside, who has been made a party respondent herein, is the executor of both wills.

The petitioner had possession of the premises under the foregoing contract from and after May 20, 1901, paying the rent and taxes as required by its terms, and paying liens amounting to \$922.58, and making improvements and repairs to the amount of \$944.56. The improvements consisted in part of deepening the cellar, putting in a cement floor, new cellar windows, frames, sash and grates, new first-story floor; a new elevator, girder and timbers to strengthen the building; new door frames and doors, and a new bridge connecting the two buildings upon the premises at the second story. The buildings had been used as a coach or carriage factory, and changes were made so as to adapt them to petitioner's use in carrying on the hardware business.

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This agreement of lease to and optional purchase by the petitioner was made and entered into by parties fully competent to contract. It secured to the owners of the premises interest at the rate of five per cent. per annum upon the optional purchase price of the premises, payable in monthly installments, and freedom from all expenditure for taxes, repairs, improvements, or municipal claims. The petitioner desired a location for his business as a hardware merchant, and expended about \$944.56 to improve the premises and adapt them to his use, and paid a paving lien of more than \$900.00 against the property. The owners of the premises were entirely willing to permit the petitioner to have ten years within which to exercise the option to purchase. There was nothing unusual or unreasonable in this agreement and the owners of the premises received the money payable to them under the agreement without dissent as long as they lived. The agreement was duly recorded in Miscellaneous Book "S", Vol. 2, page 384, and the widow and devisees of the owners had notice of its terms. On or about August 22, 1908, the petitioner gave verbal notice that he elected to purchase the property in accordance with the option reserved to him in the lease or agreement and had a deed prepared for the conveyance of the premises to him. Harry I. Whiteside, executor, informed the petitioner that the parties would not execute the conveyance as they believed the option had expired, and the widow of George A. Whiteside further informed the petitioner that she would not join in the conveyance. The petitioner thereafter continued to pay the rent and taxes in accordance with the lease, and on or about July 26, 1910, gave a notice in writing to the respondents that he elected to exercise the option to purchase the land in accordance with the aforesaid agreement, and designated the 20th of September, 1910, as the time when he would be ready to pay the amount of the purchase money, \$10,500.00, upon delivery of a deed for the premises. This notice is Exhibit "D" accompanying petitioner's bill. The respondents failed to prepare or tender the deed in accordance with this notice, and thereafter the petitioner filed his petition. This written notice is stated to be in continuance and confirmation of a previous verbal notice of petitioner's intention to exercise the option to purchase.

It is admitted in the answer of respondents that on or about August 22, 1908, the petitioner gave notice to Harry I. White-

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side, the executor of George A. Whiteside, that he elected to exercise his option to purchase, and was informed by said executor that he was advised the option had expired, and that he and others interested in the property refused to make a deed to the petitioner for the premises. No reason appears to have been given for the refusal, except that the respondents claimed that the option had expired. The option, however, in fact and in law had not then expired, and the petitioner's election to accept the option on August 22, 1908, was in time and a valid and proper acceptance. The effect of this acceptance was to make the petitioner a debtor for the amount of the purchase money mentioned in the option. Its effect is well stated in Frick's Appeal, 101 Pa. 489:

"He accepted it and gave to the appellant notice thereof within the time specified. By this agreement and notice the contract become binding on both parties thereto. Thenceforth there was no want of mutuality. It became a binding agreement for the sale and the purchase of the real estate. In equity the vendee became the owner thereof subject to the payment of the price stipulated. His right of property therein flows from the contract and exists before any payment of purchase money may have been made."

As already stated the agreement was duly made April 23, 1901, and confirmed, and the time for the exercise of the option to purchase definitely expressed, by the supplemental agreement of March 29, 1906. The parties were competent to contract and the agreement was reasonable and satisfactory to the parties. The petitioner has not been in any default in his election to exercise the option to purchase granted him by the lease and agreement he has taken possession of the property and has established his business thereon and expended money to discharge a paving lien and to adapt the premises to his business uses, and we are unable to discover any equitable or reasonable grounds why a specific performance of the agreement should not now be decreed. On the contrary it would be against equity to refuse such performance. The petitioner is not estopped by anything that has occurred from asserting his right to purchase the premises in pursuance of the option. It is admitted that the petitioner gave notice to the respondents of his election to exercise the option on or about August 22, 1908, and upon that date the petitioner by the exercise of his option became indebted to the respondents in the amount of

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the purchase money, to wit, \$10,500.00. That indebtedness should bear legal interest from August 22, 1908, and the petitioner is entitled to credit upon the interest for whatever sums he may have paid as rent from and after that date.

It is true that Catherine E. Whiteside, widow of George A. Whiteside, was not a party to the lease and agreement in this case, nor is she a party respondent to the pending petition, nor decree is asked or could be made against her, and the petitioner has stated at bar during the hearing of this case that he is entirely willing to accept a deed for the premises from the respondents, subject to the dower or other interest of the widow of George A. Whiteside.

It appears from the answer filed that the decedents, George A. Whiteside and Margaretta P. Whiteside, did not own the entire title to the ground covered by the lease and option, but owned only 726/768 of this land. It thus appears that the decedents did not own 7/128 of the premises. The petitioner has stated that he is willing to accept a conveyance of the interest of the decedents in the premises subject to the dower or other rights of the widow of George A. Whiteside and have a deduction from the purchase money for the portion of the premises not owned by the decedents. The value of 7/128 of the property not owned by the decedents, according to the contract price, is \$574.22. Deducting this from the purchase price of \$10,500 and the decedents' representative will be entitled to receive from the petitioner the sum of \$9,925.78. That the petitioner has the right to elect to take a conveyance of that portion of the premises which decedents' representative is able to convey and have a proportionate reduction of the purchase price is settled by numerous authorities, among which are *Erwin vs. Myers*, 46 Pa. 96; *Barnes Appeal*, 46 Pa. 350; *Napier vs. Darlington*, 70 Pa. 64.

We are satisfied from the testimony submitted that the petitioner is entitled to a specific performance of the contract for the purchase of the premises described in the petition. Let a decree for such performance, subject to deduction from the purchase money as above suggested and subject also to the dower and other rights of the widow of George A. Whiteside, fixing the amount of the purchase money remaining due and unpaid be prepared and presented for our consideration, and we will then fix a date upon which the purchase money must be paid and conveyance delivered.

Alfred Bechtel vs. Wellington Klinger.

The petitioner has presented requests for findings of fact and conclusions of law, which requests are answered and filed herewith as part of this opinion.

ALFRED BECHTEL vs. WELLINGTON KLINGER.

Public sales—Secret bidding by auctioneer.

At a public sale, one of the conditions being that the highest and best bidder should be the buyer, secret bidding by the auctioneer is fraudulent and against public policy.

Motion for new trial. C. P. Dauphin County, No. 477 September Term, 1908.

M. E. Stroup, for plaintiff.

Nciffer & Saussaman, for defendant.

McCARRELL, J., November 12, 1914.

The judgment in this case was given to secure payment of \$1,400.00 loaned by the plaintiff to the defendant. An execution having been issued thereon, the judgment was opened in order to permit inquiry as to the validity of two certain receipts given by plaintiff to defendant on account of the judgment. One receipt was given September 26, 1908, for \$591.00, and the other November 14, 1908, for \$209.00, making together the sum of \$800.00. The receipts admittedly were not given for money paid. The receipt of September 26, 1908, was given for 10% upon the purchase at public sale by the plaintiff of certain real estate belonging to the defendant, and the receipt of November 14, 1908, was given at the time the defendant released the plaintiff from the purchase of said real estate. The sale was a public one, with the condition announced that the highest and best bidder should be the buyer. A single bid was made by a stranger who went away, and then Mr. Romberger and Mr. Bechtel, the plaintiff, bid until the price bidden was about \$4,900.00. Romberger then ceased to bid, and Bowman, the auctioneer, bid against Bechtel until the farm was struck off to Bechtel at \$5,910.00. The auctioneer was employed and paid by Klinger. No one seems to have known that the auctioneer was bidding, and he himself testified that he told no one about his bidding until some time in April following the sale in September. Thus it appears that the auctioneer by se-

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cret bid ran the price up against Bechtel more than \$1,000.00. Bechtel on the day of the sale gave Klinger a receipt on account of the judgment for \$591.00, being 10% of the amount bidden by him for the property, and afterwards, on November 14, 1908, gave him an additional receipt for \$209.00, being the balance of the amount agreed upon for the release of Bechtel from his contract of purchase. After all this had been done Bechtel heard of the secret bidding of Klinger's auctioneer against him, refused to recognize these receipts as valid credits upon the judgment, and issued execution thereon. The judgment was then opened and all the circumstances connected with the sale were submitted to a jury, which found that the sale was fraudulently conducted, that the receipts were not valid credits upon the judgment, and that the defendant was indebted for the amount of the receipts, with interest thereon. By the conditions of sale Klinger announced that the sale should be made to the highest and best bidder, and yet his own auctioneer admittedly by secret bids advanced the price more than \$1,000.00. That this was fraudulent and against public policy cannot be successfully disputed. The statement of the auctioneer that he honestly intended to purchase for himself was not credited by the jury. The conclusion reached by the jury appears to us to be in accord with the testimony and entirely just and fair. The defendant has his land and there is no just reason why he should also have \$800.00 of the plaintiff's money.

We have carefully considered all the reasons urged for a new trial, but are unable to discover any reason why we should disturb the verdict. The motion for a new trial is therefore overruled and judgment is directed to be entered on the verdict upon payment of the jury fee.

W. R. GRUBB, ET AL., vs. BANGOR ELECTRIC LIGHT, HEAT AND
POWER COMPANY, ET AL.

*Corporations—Powers and duties of corporations formed by
mergers.*

The Bangor Electric Light, Heat and Power Company was incorporated with power to furnish electric light and also heat to the Borough of Bangor, and by virtue of the consent of the borough it engaged in supplying heat by means of steam to the inhabitants. Its plant and franchises were sold to the Eastern Pennsylvania Power Company, which later became merged in the Pennsylvania Utilities Company. The Eastern Pennsylvania Power Company furnished steam heat to the public during the time of its ownership of the plant. The Pennsylvania Utilities Company caused the incorporation of the Bangor Steam Heating Company and sold to it the distributing system at Bangor, but retained the ownership of the generating plant there, and the Bangor Steam Heating Company supplied steam heat until May, 1914, when it notified its consumers that the service would be discontinued. Against this discontinuance of service the complaint in this case was filed.

Held, That it may be assumed that by the successive conveyances and mergers, the rights, properties and franchises of the Bangor Electric Company, with the corresponding duties and obligations to the public became vested in the Pennsylvania Utilities Company. The contention of the defendants that the Bangor Electric Light, Heat and Power Company, and each of the later corporations, has no right under the acts of assembly to supply steam heat, can be raised in a proper proceeding in court. A corporation ought not to be permitted to set up for its own advantage a lack of power to perform an obligation to a consumer which it has voluntarily assumed and upon which the consumer has expended money and for which he has given up rights of property. The commission in such a case will not be asfute to look beyond the plain words of the charter granting the power to supply heat, and it will assume in this case that the officials of the commonwealth charged with the duty of supervising the issuing of charters properly perform these duties.

Held, That it was the duty of the Pennsylvania Utilities Company to continue to supply steam heat to the complainants.

Public Service Commission. No. 285, Complaint Docket.

PENNYPACKER, Commissioner, October 8, 1914.

This is a case of importance which has been considered with

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such care as time allowed, but since it involves the cutting off of the supply of heat to the citizens of a borough, and since cold weather may any day overtake them, it is important that it should be decided without delay. Fortunately the commission has had the benefit of full and able arguments by counsel. The essential facts are as follows:

The Bangor Electric Light, Heat and Power Company was incorporated in 1894, with power to furnish electric light and also heat to the Borough of Bangor. In 1902, having secured the right, by consent of the borough, to lay mains and pipes through the streets, it began to supply heat to the complainants in their houses and places of business. The corporation had a plant with four boilers in Bangor where it generated electricity, and the steam heat was chiefly, if not entirely, the exhaust steam from the engines driven by the steam from these boilers. It sought the business of the complainants and placed branch pipes running through their properties and into their cellars, which pipes were paid for in certain proportions by the corporation and the complainants. Many of the houses, because of the statements of agents of the corporation and of dependence upon this source of supply, were erected without other facilities for furnishing heat.

In 1910 the Bangor Electric Light, Heat and Power Company sold its plant and franchises to the Eastern Pennsylvania Power Company, and this latter corporation became merged in 1913, into the Pennsylvania Utilities Company. During the time of its separate ownership of the plant, the Eastern Pennsylvania Power Company continued to furnish the steam heat. The Pennsylvania Utilities Company, a corporation with many affiliations and whose operations cover a considerable extent of territory, erected a plant for generating electricity at Easton, about seventeen miles from Bangor. It caused the incorporation of the Bangor Steam Heating Company, and sold to it the distributing system at Bangor, but retained the ownership of the generating plant there. The Bangor Steam Heating Company supplied steam heat to the complainants from the Fall of 1913 until May, 1914. The Pennsylvania Utilities Company, about this time, removed one of the four boilers at Bangor to be used elsewhere. In May of 1914, the steam heat was turned off, after notice, and a further supply is refused. The mains remain in the streets, and the branch pipes remain on the properties of the complainants.

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It may be reasonably assumed that by these successive conveyances and mergers, the rights, properties and franchises of the Bangor Electric Light, Heat and Power Company, with the corresponding duties and obligations to the public, became vested in the Pennsylvania Utilities Company. The contention of the defendants is, however, that under the acts of assembly authorizing its incorporation, the Bangor Electric Light, Heat and Power Company and each of the later corporations have no power to supply steam heat. Without determining the question whether any corporation, without special authority, may not engage to sell its waste products, such as exhaust steam, it is sufficient to point out that a corporation ought not to be permitted to set up for its own advantage a lack of power to perform an obligation to a consumer which it has voluntarily assumed, and upon which the consumer has expended moneys and for which he has given up rights of property. Nor will the commission, in such a case, be astute to look beyond the plain words of the charter granting the power to supply heat. Such questions can, with more propriety, be raised in a proper proceeding in a court, where they can be determined with certainty. For the purpose of the present inquiry, the commission will assume that the officials of the commonwealth charged with the duty of supervising the issuing of charters properly performed those duties. While the commission, perhaps, ought not to close its eyes to a plain violation of law appearing in a charter, in the present case the power was expressly granted and was exercised by each of the corporations in succession, through altogether a period of twelve years.

We are of the opinion that it was the duty of the Pennsylvania Utilities Company, after the merger of the Eastern Pennsylvania Power Company, to continue to supply steam heat to the complainants. By its sale of the distributing facilities to the Bangor Steam Heating Company it became practically and physically impossible for either corporation, alone, to supply the steam heat, that is to say, the one corporation had no source or means of supply, and the other no way of distributing steam heat to the consumer. A public duty cannot be escaped in this way. For the purpose of this supply and the obligation to the consumer, the two corporations may still be regarded as a single entity. The duty is mutual and each must perform its part. The Pennsylvania Utilities Company and the Bangor Steam Heating Company ought together to be required

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to continue the supply of steam heat to the complainants, and an order will be issued accordingly.

ORDER.

This case being at issue, upon complaint and answer on file and having been duly heard and submitted by the parties, and investigation of the matters and things involved having been had, and the commission having, on the date hereof, submitted and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof :

Now, to wit, October 8, 1914, it is ordered, That the Bangor Steam Heating Company and the Pennsylvania Utilities Company shall, from the date of this order, furnish steam heat to the complainants and all other consumers or users of such steam heat within the Borough of Bangor, as heretofore.

JOHN A. ERNST, ET AL., vs. GLENSIDE WATER COMPANY

Water companies—Rates—Adequacy and quality of supply

The complainants alleged that the rates charged by the Glenside Water Company were excessive and exorbitant; that the service was inadequate and insufficient; and that the water supplied by the company was impure.

Held, That under the evidence the rates were not excessive or exorbitant, but that the supply of water and the facilities of the company should be improved by making certain alterations and installations recommended by the commission.

Public Service Commission, No. 205, Complaint Docket.

BRECHT, Commissioner, August 18, 1914.

Glenside is a small village lying directly across the Schuylkill river from the City of Reading, and is connected with the latter by an iron bridge. It contains eighty odd houses, but has no public buildings, manufactories, or warehouses within its borders. The village is therefore, wholly a residential community.

The people of Glenside have been furnished with water for domestic and other incidental consumption by the Glenside

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Water Company, a corporation which was chartered in November, 1902. In the month of May following, the water company aforesaid entered into a contract with the City of Reading to supply the water which the said company expected to deliver to the consumers of Glenside when it commenced operations. In February, 1904, the Glenside Water Company began to supply the citizens of Glenside with water, and continued the service until August 1, 1911, when the city was enjoined from selling water thereafter to consumers outside of the city limits.

When the injunction was served upon the Glenside Water Company, it began to look around for another source from which to obtain its supply of water. Tulpehocken creek is flowing along the border of the village, but as its water was used for power purposes, the company could not obtain water from that source without being "held for damages for diverting the water." To take the water from the Schuylkill river it was necessary to construct a filtration plant and power house, and the cost of erecting such a plant equipment adequate in all respects would be so great, as was found from an estimate submitted to the company, that it would make the rates to consumers in a small community like Glenside, prohibitive, and water had therefore to be obtained from some other source. Accordingly, in August, 1911, the company entered into arrangements to have an artesian well drilled, and after two years drilling, water was obtained at a depth of 410 feet. On the 16th of June, 1913, the company began to supply the community of Glenside with water from the artesian well by means of a pump and standpipe.

In the complaint now pending against the Glenside Water Company on behalf of the citizens of Glenside, it is alleged (1), that "the supply of water now furnished by the company is inadequate and insufficient;" that "the complainants were and are unable to get a sufficient supply of water, especially on the second story of their houses, on account of the low and insufficient pressure;" (2), that "the water furnished is not clean, but full of grit and sand, causing the pipes, and especially the water backs in the kitchen stoves, to clog up, causing grave danger from explosions;" (3), that "the rates charged by the defendant company are excessive and exorbitant."

(1) With respect to the charge that the supply of water now furnished to the people of Glenside is insufficient in quantity: It is admitted by complainant that there would be "plenty of

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water" if the standpipe was kept filled. No testimony was offered to show that the capacity of the pump in use is not adequate to keep the standpipe full of water, and thus meet all of the requirements of the consumer. The testimony submitted by the president of the Berks Engineering Company, who originally installed the pump, sets forth that "the pump as it works to-day has a capacity of 34,312 gallons in twenty-four hours, or 2,263 gallons per hour," and that the pump can be adjusted to supply 10,000 gallons per hour.

As to the insufficient supply of water, especially on the second story of the houses, a number of witnesses testified that on or about February 9th and 13th last, and on three or four days throughout the month of March, no water could be drawn in most instances during the greater part of the day. One of the witnesses testified that he also had the same trouble on the 16th and 20th of June, and found that the gauge on the standpipe at that time indicated that there were only twenty-two and one-half feet of water in the pipe. In reply to question of counsel: "Does this frequently happen?" witness answered, "16th and 20th of June."

From the testimony offered by complainant at the hearing, it appears that the trouble experienced by the citizens of Glenside in not getting an adequate supply of water was confined very largely to the three or four days each in March and February last. A few families living on the more elevated sections of the village also had a shortage in the water supply on the second story of their houses on a few other occasions. But no specific dates were given or particulars cited when there was an inadequacy in the supply of water, except on the three or four days in February and March, and on the 16th and 20th of June, as testified by one witness.

Respondent admitted that on the days specified in February and March by complainant, the company was unable to furnish water to its patrons on account of trouble in the pumping machinery, caused by the freezing of the automatic device which is used in starting and stopping the pump. This device is connected with a pressure gauge, and when the water reaches within three feet of the top of the standpipe, the circuit is cut out and the pump stopped automatically; and when the level of the water in the tank has fallen ten feet, the circuit is again established and the pump started. Under this method of operating the flow of water from the well, there are 67 feet of water

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in the standpipe when the pump is stopped, and 10 feet less, or 57 feet of water in the pipe when the pump is started again. But as the pipe leading from the automatic device to the gauge is only a quarter-inch pipe, it froze quickly "a number of times before it was discovered," and consequently, the pump not being started, the water would reach a low level in the standpipe, and interfere more or less with the distribution of water to the consumers.

The type of device now in use was recommended to the company and installed under the contract of constructing the plant, but since it has been found to be unsatisfactory in freezing weather, instructions have been given by respondent to dispense with the small pipe, and install an automatic that will connect directly with the pressure gauge, and thus eliminate the trouble experienced last winter during the extreme cold.

As to the character of the plant of the Glenside Water Company, the following evidence was given by the chief engineer of the Bureau of Water of the City of Reading:

Q. Have you made an examination of their plaint since that time?

A. Yes, sir.

Q. When?

A. Since the pump has been erected.

Q. What have you to say as to their method of supplying water to their consumers?

A. It seems to be up-to-date.

Q. The method of pumping, the automatic device and standpipe, will you state whether in your opinion as a hydraulic expert, it is sufficient for the people of Glenside at this time?

A. It is.

(2) With respect to the "grit and sand" found in the water and the danger of explosions due to pipes and water backs becoming clogged therefrom: A sample of water and several sample of "grit and sand" were offered in evidence by the complainant to substantiate this charge. It developed that the person who obtained the sample of water was not present to testify as to where or when he procured the water. The samples of "grit and sand" offered in evidence were taken out of water-backs in kitchen stoves, and had the appearance of the usual limestone scale found adhering to the sides and bottoms of vessels used some length of time for the purpose of heating limestone water.

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As the present water supply was installed not more than a year before the samples offered in evidence were secured, it is difficult to understand how a hard, gritty shell a quarter of an inch or more in thickness could be deposited on the lining of a water-back in so short an interval of time. If however, the substance taken from the water-backs is "grit and sand," and not the ordinary scale deposit found in vessels when limestone water is heated, it would not necessarily follow that the said material was found in the water pumped in the past year from the artesian well, 410 feet deep, and distributed by gravity from a standpipe, but may be due to the water supplied from the City of Reading which was furnished to the people of Glenside during the ten years prior to June 15, 1913.

There was no evidence offered to show when the water-backs from which the scale was taken had last been examined and cleaned out, and therefore, as far as may be determined from the facts submitted to the commission, the sediment of "grit and sand" may have been accumulating during the past five or ten years. The water supplied by the Glenside Water Company to the citizens of Glenside was examined and analyzed in January, 1913, by the State Board of Health and approved by certificate as being of standard purity.

The allegations made concerning explosions from clogged water-backs in kitchen stoves were not supported by any testimony founded upon fact but seemed to be based entirely upon a general report to that effect which had circulated in the community. There was no evidence offered to show where or when such explosions occurred, or that any explosions were connected with the service of the respondent company. The facts, therefore, submitted at the hearing are not deemed sufficient to hold the respondent company responsible for the alleged condition of the water now delivered to the people of Glenside.

(3) With respect to the alleged high and excessive rates charged: There are no facts or figures offered by complainant in support of this allegation except the general statement that that rates charged by the City of Reading for similar service are much lower than the rates at Glenside. But a mere comparison between the rates charged by a large municipality like Reading, and the rates of a small community, consisting of about eighty families, is not sufficient for the purpose of arriving at a just and equitable rate. According to a decision of the

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Supreme Court of Pennsylvania, a town where the work of obtaining a sufficient supply of water is difficult and expensive, could not be expected to have as low a rate for its water service as another town even of the same size and population, where the procurement of water is comparatively inexpensive.

From the testimony of the secretary and treasurer of the Glenside Water Company, it appears that the receipts of the company for the year ending June 30, 1914, were \$1,389.08; the operating expenses and interest charges for the same period were \$1,846.34, leaving a deficit of \$457.26. No salary was ever paid to its superintendent, or its secretary or treasurer, and no dividend was ever declared or paid upon its capital stock of \$3,000. The company has eighty-one consumers, and carries a bonded indebtedness of \$16,500, on which interest at the rate of 5 per cent. per annum is paid.

Since there is no return on its investment, but a deficit of more than 30 per cent. of its total receipts, and since no evidence was produced at the hearing to controvert these figures, the commission is of the opinion that the rates charged by the Glenside Water Company to consumers at Glenside are not excessive or exorbitant or unreasonably high.

However, since the respondent company experienced considerable trouble at certain periods during the past winter in furnishing its patrons with an adequate supply of water, the commission will ask the said company to take the following steps of precaution in the operation of its plant at Glenside:

1. To make the improvement suggested at the hearing, in the character of the automatic device attached to the standpipe, before winter opens again.

2. To send to this commission as soon as the aforesaid device has been installed, a brief description, giving the principle of its construction, including a statement showing wherein the new device is superior to the one now in use.

3. To devise some plan by which the pipe that extends across the bridge and connects with the Reading water plant, and which the company proposes to use in cases of emergency, will be protected from freezing, so that it may be available for service whenever the occasion to use it may arise.

4. To flush the fire plugs at Glenside at least once every spring and fall, in April and October, respectively.

5. To notify the consumers promptly of any break in the pumping machinery or of any interruption in the service that

Joseph Cauffiel, et al., vs. Citizens' Light, Heat and Power Company. will likely cut off the usual supply of water to the community.

6. To keep a record during the month of January, 1915, which will show for each day of the month the maximum and minimum height of water in the standpipe, and forward a copy of the report so kept to this commission.

ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, August 18, 1914, it is ordered, That the complaint, in so far as it relates to the rates charged by the Glenside Water Company, be and it is hereby dismissed, and it is further ordered: That the Glenside Water Company carry out the improvements in the service of said company set forth in the report attached to and made a part hereof.

JOSEPH CAUFFIEL, ET AL., vs. CITIZENS' LIGHT, HEAT AND POWER COMPANY, JOHNSTOWN, PENNA.

Light, heat and power companies—Deposit before installation of service—Rates.

The complainants alleged that the practice of The Public Service Company of requiring a deposit to guarantee payment of bills for service was unjust, and that the minimum monthly charge of one dollar for electric lighting service was also unjust and unreasonable.

Held: That the evidence produced did not show that either of the practices of the public service company in this instance was unjust or unreasonable.

Public Service Commission. No. 237 Complaint Docket.

BY THE COMMISSION, October 6, 1914.

Joseph Cauffiel, on behalf of certain citizens of Johnstown, complained to the Commission that the practice of the Citizens' Light, Heat and Power Company of requiring from certain customers a deposit of five dollars (\$5.00) before installing service was unjust and unreasonable, and also that the mini-

Joseph Cauffiel, et al., *vs.* Citizens' Light, Heat and Power Company. minimum monthly charge of said company of one dollar (\$1.00) was unjust and unreasonable.

A hearing on this complaint was held by the Commission, and from the testimony produced by both the complainant and the respondent, it appears to the Commission that the deposit of five dollars is required of prospective customers of the company who are not property owners, or who have not in some manner shown to the company their ability to pay for the service which they desire. This practice is one in very general use in the commonwealth, and does not appear to the Commission to be either unjust or unreasonable.

In regard to the minimum monthly charge of one dollar, the testimony shows that this charge is an increase over a minimum charge formerly made by the company, but that it is not more than is reasonable required to meet the expenses necessarily incurred by the company to place it in a position to be ready to serve the customers, nor is it more than the usual charge for such service.

It is therefore the opinion of the Commission that the complaint in this case should be dismissed, and an order will be so drawn.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, October 6, 1914, it is ordered: That the complaint in this proceeding be and it is hereby dismissed.

THE PETITION OF THE YORK WATER COMPANY FOR PROCESS TO PREVENT THE CITY OF YORK FROM VIOLATING THE PROVISIONS OF THE PUBLIC SERVICE COMPANY LAW, BY RESTRAINING HER FROM ENFORCING HER ORDINANCES TO COMPEL THE PETITIONER TO INSTALL A METER SERVICE FOR ONE CLASS OF PATRONS OR CUSTOMERS, AND TO REGULATE ITS RATES.

Public Service Commission—Powers—Municipal legislation.

The York Water Company petitioned the Commission to request the attorney general to proceed in the name of the commonwealth, by injunction or other appropriate remedy, to restrain the city of York, its officers, councils, and employees, from enforcing the provisions of an ordinance passed by the city requiring the water company to conform to certain regulations in regard to meters.

Held: That there is no such violation of the Public Service Company Act shown as the attorney general could be asked by the Commission to restrain, and that, if the ordinance of the city is as contended, in conflict with the law, the remedy of the complainants is in the courts. The Commission has no power to supervise or control municipal legislation or its consequences.

Public Service Commission. No. 212 Complaint Docket.

PENNYPACKER, Commissioner, October 9, 1914.

The council of the city of York, February 27, 1914, passed an ordinance requiring that the York Water Company, its successors and assigns, whenever requested so to do in writing by any consumer of water within the city of York, shall install at its own expense and maintain thereafter without any further charge or expense to the consumer, a meter for the measuring of the quantity of water used or consumed, and to base its charges or rates therefor in the manner prescribed by law.

The mayor of the city approved the ordinance and a later amendment. Thereupon the York Water Company filed with the Commission, July 10, 1914, its petition praying that the Commission "will request the attorney general of this commonwealth pursuant to the provisions of Section 34 of Article V of The Public Service Company Law, to proceed in the name of the commonwealth by injunction or other appropriate remedy at law or in equity to restrain the city of York, its officers, council and employees from enforcing the provisions of the said ordinances heretofore recited."

Petition of York Water Company.

Many of the propositions urged in the able argument of counsel for the petition may be admitted, to wit That it was the intention of the legislature to place in The Public Service Commission the control of the service and facilities of water companies; that it would be difficult for the water company to obey two different authorities; that the Commission has the power to require the installation of meters; that obedience to the ordinance would result in discrimination; that the Act of July 26, 1913, repealed the Act of June 27, 1913; and that the Act of June 27, 1913, is unconstitutional. Assuming all of these statements of law to be correct, the inquiry still arises as to where the Commission derives its authority, or where the duty is imposed upon it, to ask the attorney general to restrain municipalities from the passage and enforcement of ordinances, even though they be contrary to the law. The Act of July 26, 1913, gives to the Commission the power to supervise contracts between municipal corporations and public service companies, and prevents those corporations from constructing plants for public service without the approval of the Commission, but nowhere is there given power to the Commission to supervise or control municipal legislation or its consequences. There is no such violation of the Public Service Act as the attorney general could be asked to restrain. The municipal authorities are the representatives of the people in their local affairs. This Commission ought not to assume any control over the officers of municipalities in the performance of duties imposed upon them by municipal authority, unless it appears with sufficient clearance that this is the meaning and intention of the legislature conferring its powers. If the Commission were to undertake to restrain municipalities in every instance where there is the possibility of infringement upon the authority of the Commission, its jurisdiction would be indefinitely extended. If, as is contended, the ordinances of the borough are in conflict with the law, it is the not unusual case of a wrong committed for the redress of which the courts are always open. In its inception the effort may be restrained, and if consummated, damages may be awarded.

For these reasons the petition must be dismissed.

ORDER.

This case being at issue upon petition filed and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the

S. Herman Zook *vs.* West Kishacoquillas Turnpike Road Company. Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

Now, to wit, October 9, 1914, it is ordered: That the petition in this proceeding be and it is hereby dismissed.

S. HERMAN ZOOK *vs.* WEST KISHACOQUILLAS TURNPIKE ROAD COMPANY.

Turnpike companies—Rates—Service.

The complainant alleges that the facilities of the respondent are inadequate and are maintained in such condition that it is impossible to render the service to which the public is entitled, and also that the rates charged are unjust and unreasonable.

Held: That under the evidence produced the Commission is of the opinion that the rates of toll are reasonable and lawful.

Held: That the respondent has not performed its full duty in maintaining the turnpike road, and that it should make the improvements set forth in the order of the Commission.

Public Service Commission. No. 249 Complaint Docket.

TONE, Commissioner, October 20, 1914.

The complaint of S. Herman Zook against the West Kishacoquillas Turnpike Road Company alleges that the greater portion of the turnpike road of the respondent is out of order and repair, inconvenient and dangerous to public travel, that very little work has been done or material placed on the road for five years, the side ditches are filled up and in many places water stands almost constantly on the road; that the toll is the unjust and unreasonable for the service aborbed; and that the respondent is discriminating by demanding and receiving less compensation from some persons than from others.

From the evidence submitted at the hearing, the facts found are, that the respondent company under a special act of legislature enacted in 1853 was incorporated as "The West Kishacoquillas Valley Turnpike Road Company with power to construct a turnpike road from Brown's Mill, on the Kishacoquillas and Bellefonte Turnpike, or Lewistown and Kishacoquillas Turnpike in Mifflin County, by the nearest and best routes, in

S. Herman Zook *vs.* West Kishacoquillas Turnpike Road Company. the opinion of the directors, or a majority of them, as shall be for the interests of the company, to the village of Mill Creek, on the Pennsylvania Canal and Railroad, in Brady Township, Huntingdon County, subject to all the provisions and restrictions of an act regulating turnpike and plank road companies approved the 26th day of January, 1849, and the several supplements thereto;" that the company proceeded and constructed a turnpike road from a point at or near The Spanogle-Yeager mill in the village of Reedsville (or the Lewistown and Kishacoquillas Turnpike) for a distance of about four and one-half miles westerly therefrom to a point opposite the former home of John Garver; that the tolls charged for a round trip over the turnpike, a distance of nine miles, are for a four-wheeled vehicle drawn by one horse, thirteen (13c.) cents; for a similar vehicle drawn by two horses, eighteen (18c.) cents; for an automobile, twenty-five (25c.) cents; that the Act of 1849 regulating turnpike and plank road companies provided that the tolls to be collected should be "for every five miles in length of the said roads completed and licensed as aforesaid, the following sums of money, and so in proportion for any lesser distance, . . . for every chariot, coach, phaeton or dearborn with one horse and four wheels, ten cents; for every coach, phaeton or chaise with two horses and four wheels, twelve cents for either of the carriages last mentioned with four horses, twenty cents; for every other carriage of pleasure under whatever name it may go, the like sums according to the number of wheels and horses drawing the same;" that an act of the legislature passed in 1868 provided "that the West Kishacoquillas Valley Turnpike Road Company incorporated by the act approved second day of April, 1853, may from time to time, by a vote of the stockholders, at a meeting called for that purpose, increase the rates of toll provided by its act of incorporation, so much as in their opinion may be expedient; provided, that the said tolls shall in no case be increased more than fifty per centum;" that as shown by the testimony of H. R. Reed, who is manager, secretary and treasurer of the company, the capital stock of the company is \$9,500,00, and the receipts and expenditures of the company for the past six years were as follows:

S. Herman Zook *vs.* West Kishacoquillas Turnpike Road Company.

Year Ending Nov. 1.	Receipts.	Expenditures.				
		Materials.	Hauling.	Labor.	Taxes.	Superintendent, Gatekeeper, Secretary, Rents, etc.
1909, ...	\$701 95	\$53 52	\$131 00	\$35 00	\$22 80	\$24 00
1910, ...	627 94	42 08	114 50	27 00	22 80	76 00
1911, ...	662 50	46 52	15 25	34 38	47 50	229 00
1912, ...	587 18	42 04	41 50	21 50	47 50	230 75
1913, ...	638 10	83 76	122 00	30 00		247 00
1914-10 mos.,	706 87	244 54	115 50	127 07		90 25

The earnings averaged two per cent. per year and two dividends of six per cent. each were paid in the six years; that there are numerous places along the road where water accumulates forming mud-holes; that the road is not properly ditched and drained; that the use of "breakers" for cross drainage is still continued, although the Act of June 15, 1911, prohibits the same; that the hand or guard rail on the approach to a bridge near the "woolen mill" is not secure nor substantial; that at the east end of said bridge the surface of the road has a steep down grade, causing difficulty to vehicles going over same, and which could be remedied by filling in the turnpike at this point, forming an easier grade and less abrupt change of grade at the east end of the bridge.

The report of H. R. Reed for the years of 1911, 1912, and 1913, giving the expenditures for material and labor of so limited amounts causes serious doubt as to whether the company was taking proper and sufficient care of the turnpike, as the amounts during those years paid the gatekeeper, superintendent, secretary or treasurer, far exceed the amounts expended on the maintenance of the turnpike.

S. Herman Zook *vs.* West Kishacoquillas Turnpike Road Company.

The receipts for tolls, averaging about \$655.00 per annum, indicate that the affairs of the company require most careful and economical management.

The complainant's allegation regarding tolls was that they are unreasonable for the service afforded, in that they are not in accordance with those authorized by the Act of 1849; and that the tolls for an automobile, being a four-wheeled vehicle without horses, should not exceed those for a four-wheeled vehicle drawn by one horse. The tolls charged horse-drawn vehicles are within or less than those authorized under the Act of 1868, which is supplementary to the Act of 1853; and the increasing use of automobiles requires for their safe and comfortable passage, that all highways be maintained in a better condition than formerly, and than has been considered necessary for horse-drawn vehicles, with a resulting increase in the cost of highway repairs and maintenance.

The annual receipts of the respondent cannot be considered excessive in the amount necessary to provide funds for the maintenance of four and one-half miles of turnpike road and some return on the investment in the capital stock of the company, and it is the opinion of the Commission that the rates of toll are reasonable and lawful.

The complainant at the hearing withdrew its charges of discrimination.

The Commission is further of the opinion that the respondent has not performed its full duty toward the proper maintenance of the road, and that the respondent should:

- 1st. Repair or renew the hand or guard rail on the approaches to the bridge at the "woolen mill."
- 2d. Raise the surface of the road at the east end of said bridge to form an easier grade approaching the bridge.
- 3d. Maintain and keep the ditches along the sides of the road open and free from obstruction at all reasonable times.
- 4th. On or before July 1, 1915, remove the breakers now across the road, substituting therefor cross-drains under the road surface, and in accordance with the act of the legislature relating thereto, approved by the governor, June 15, 1911.
- 5th. Continue a systematic and regular annual repair to the surface of the road by the addition of broken stone

S. Herman Zook vs. West Kishacoquillas Turnpike Road Company.

to such an extent as its receipts provide funds for the necessary expenditure.

- 6th. Report to the Commission the time of completion of the work herein directed under first, second, third, and fourth sections.

ORDER.

This case being at issue, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, October 20, 1914, it is ordered: That the West Kishacoquillis Turnpike Road Company shall:

- 1st. Repair or renew the hand or guard rail on the approaches to the bridge at the "woolen mill."
 - 2d. Raise the surface of the road at the east end of said bridge to form an easier grade approaching the bridge.
 - 3d. Maintain and keep the ditches along the sides of the road open and free from obstruction at all reasonable times.
 - 4th. On or before July 1, 1915, remove the breakers now across the road, substituting therefor cross-drains under the road surface, and in accordance with the act of the legislature relating thereto, approved by the governor, June 15, 1911.
 - 5th. Continue a systematic and regular annual repair to the surface of the road by the addition of broken stone to such an extent as its receipts provide funds for the necessary expenditure.
 - 6th. Report to the Commission the time of completion of the work herein directed under first, second, third, and fourth sections.
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THE GOOD SHEPHERD HOME v. LEHIGH VALLEY LIGHT &
POWER COMPANY.

Light, heat and power companies—Rates—Uniformity.

The complainant alleged that representatives of The Public Service Company had estimated that the power necessary to operate complainant's laundry could be furnished for fifty dollars (\$50) per year and, on the basis of this estimate, the installation of the service was ordered. The Public Service Company rendered bills to the complainants at the regularly published rates of the company, which bills exceeded the amount of the estimate of its representative, and were objected to by the complainant.

Held: That that public service company was required to charge the complainant the rates set forth in its schedules and tariffs filed and posted, in the absence of any evidence that said rates were unjust and unreasonable.

Public Service Commission. No. 276 Complaint Docket.

BRECHT, Commissioner, October 6, 1914.

From the facts as substantially set forth by complainant and respondent in their respective communications in re The Good Shepherd Home v. Lehigh Valley Light and Power Company, it appears that complainant has been charged the regular rates in the published tariff of respondent for current furnished to operate its laundry; that the method pursued by respondent in refusing to accept tender of payment for complainant's bills of lighting each month by reason of the fact that complainant had refused to pay its bills for power furnished, is in accordance with a provision under respondent's general rules and regulations to furnish current, to wit:

"The discount for prompt payment, as provided in the schedules, is allowed only on bills paid on or before the 15th of the month. Attention is called to requirements of the law which prohibit allowance of this discount on all bills not paid by the 15th;" that the practice of supplying complainant tungsten lamps free of charge was a special concession extended to The Good Shepherd Home, and apparently, not allowed in the case of other consumers.

There were no facts submitted in the correspondence which tend to show that a contract of any kind was made with complainant providing for a special rate, or a fixed sum to be

The Good Shepherd Home vs. Lehigh Valley Light & Power Company. charged by the year, for the consumption of power in its laundry. Copies of the unpaid bills furnished by the respondent show that The Good Shepherd Home was charged for power the regular rates as published. To have been charged a lower rate than the regularly published rates would have been illegal, since it would be making an unfair discrimination in the rates charged different consumers for the same service rendered. A lower rate could not be justified under the act unless the same terms and rates were granted to all other consumers who might properly be placed in the same general category as complainant.

That a classification of the patrons of respondent might be made to advantage for this purpose does not appear from the facts submitted in the complaint. Consequently the Commission is not warranted in making a recommendation requiring respondent to classify its patrons and service, or change its schedules of rates, or modify the rules and regulations under which it is collecting its bills.

Similarly, there is no reason apparent why under existing conditions tungsten lamps should be furnished free to complainant unless such equipment is also supplied free of cost to all other consumers. It is the opinion of the Commission, therefore, that the complaint ought to be dismissed without recommendation.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, October 6, 1914, it is ordered: That the complaint in this proceeding be and it is hereby dismissed.

BOROUGH OF LEWISTOWN *vs.* PENN CENTRAL LIGHT AND
POWER COMPANY.

Electric light companies—Rates—Discrimination between consumers in different boroughs.

The complainant alleged that the rates charged by the public service company for electricity for domestic and business purposes in the borough of Lewistown and in Reedsville were unfair, unjust, unreasonable, exorbitant and excessive, and that an undue and unreasonable preference was given to the consumers in the borough of Huntingdon, which the public service company was supplying under substantially similar circumstances and conditions.

Held—First. That the evidence shows that the rates charged in Lewistown are not excessive, nor are they in excess of what would be considered a legitimate income for the amount of capital invested in that borough.

Second—That the rates of the company to consumers in Huntingdon were made for the purpose of meeting competition, and that the evidence produced does not show that, under the circumstances and conditions in this case, an undue or unreasonable preference is made in favor of the borough of Huntingdon.

Public Service Commission. No. 174, Complaint Docket.

WRIGHT, Commissioner, November 6, 1914:

On March 21, 1914, J. Price Wertz, of Lewistown, Mifflin County, complained to the Pennsylvania Public Service Commission that the Penn Central Light and Power Company had established meter rates, and during January and February, 1914, charged and collected for electricity used for domestic and business purposes as follows:

"12c per k. w. hour for the borough of Lewistown; 6c per k. w. hour for the borough of Reedsville, and 3c per k. w. hour for the borough of Huntingdon; all being under substantially similar circumstances and conditions," and that such difference gave an undue and unreasonable preference to residents of Reedsville and Huntingdon, and that said rate of 12c per k. w. hour in the borough of Lewistown was unfair, unjust, unreasonable, exorbitant and excessive."

Upon a hearing of the above complaint held on Tuesday, July 21, 1914, witnesses testified that the schedules and tariffs of the company in Reedsville and Lewistown were identical; that Lewistown has a population of about 9,000, Reedsville

Borough of Lewistown *vs.* Penn Central Light and Power Company. about 500, and Huntingdon about 8,000; that the tariff rates in Reedsville and Lewistown were now 12c per k. w. hour, less 20 per cent., or 9 6-10c per k. w. hour for the first thirty hours, and 6c, less 20 per cent., or 4 8-10c for the second thirty hours' service.

The evidence also shows that in Huntingdon the rate charged is 3c per k. w. hour for domestic and commercial uses; that the power rate is uniform throughout the entire system of the respondent.

The evidence also was to the effect that "the respondent company had, at large expense, made a complete investigation of the value and an analysis of the revenue and expenses of the boroughs and towns mentioned in the complaint, and that in the borough of Lewistown, their total investment was approximately \$180,000.00; for the borough of Huntingdon, \$153,000.00, not including any allowance for going value or depreciation; that the revenue for Lewistown, actual, for ten months, and estimated for two months, for the year ending July 1, 1913, was \$38,638.00, less operating expenses and taxes properly chargeable to the Lewistown plant of \$25,923.00, leaving a net revenue from Lewistown of \$12,715.00, or a trifle over 7 per cent. on the amount invested in that borough.

The evidence also shows that in Lewistown alone, approximately \$94,500.00 represents the capital investment employed in domestic and commercial lighting, or 53 per cent. of investment in that borough, and on this the company derived only \$4,500.00 revenue, applicable to dividends, incomes and surplus, or less than 5 per cent. of their investment; and that the company had approximately \$48,600.00 for capital investment devoted exclusively to residential business, upon which their net revenue, if considered alone, is less than 2 per cent., not allowing anything for renewal reserve; that the value of the Huntingdon plant is approximately \$153,000.00," and evidence shows that the company derived a profit of less than \$300.00 without allowing for taxes, fixed charges or renewal reserve; no interest being charged.

At Huntingdon, although the rate is 3c per k. w. hour, the evidence shows that the number of customers has decreased since January, 1912, when another company began service in that borough, and the decrease would have been much greater had not the Penn Central Light and Power Company secured many new customers who had never before used electricity.

Borough of Lewistown vs. Penn Central Light and Power Company.

The evidence also shows that the revenue from Huntingdon has largely decreased, and the decrease would also have been greater had it not secured new customers who had not before used electricity.

From the evidence produced at the hearing it seems plain that when considering Lewistown alone, without reference to Huntingdon, the rates do not appear to be excessive nor do they appear to be in excess of what would be considered a legitimate income for the amount of capital invested in that borough. The commission does not consider it fair to order the reduction of a rate, which by the evidence is shown to be fair and reasonable, on account of the fact that in another community the company is furnishing current at a price below the cost thereof.

The evidence also shows that if the respondent should increase their rates in the borough of Huntingdon they would undoubtedly have a decrease in the number of customers, as well as in their revenue, as they are now unable to retain many of their customers who have changed and are now connected with another electric company.

While the evidence seems to be conclusive that the patrons of the company in Huntingdon are paying less than what could be considered a reasonably fair rate, on the other hand, if the respondent should increase their rates and lose their present revenue, their plant would be useless and be almost a total loss to the stockholders of their company. The present rates of the company in Huntingdon were made for the purpose of meeting competition, otherwise the company would lose its customers, and the large investment in that borough would be a loss to the stockholders.

It appears, therefore, that the rates of respondent in the borough of Lewistown are just and reasonable, and it is hereby directed by the commission that an order be entered dismissing the complaint in this case.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed of record a report containing its findings of fact and

J. E. Callahan, et al., vs. Erie Railroad Company.

conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, November 6th, 1914, it is ordered: That the complaint in this proceeding be, and it is hereby dismissed.

J. E. CALLAHAN, ET AL., vs. ERIE RAILROAD COMPANY.

Common carriers—Passenger traffic.

The complainants alleged that the Erie Railroad Company, by discontinuing the operation of two passenger trains between Greenville and Meadville, had left the people at Kennard Station without passenger service and without means of forwarding fragile parcel post matter, and prayed the commission to direct the railroad company to re-establish said trains and maintain a station building and agent at Kennard to accommodate and care for the traffic. *Held:* That the service of the railroad company at Kennard Station was in some respects unsatisfactory, and that the railroad company should re-arrange its schedules in accordance with the directions contained in the report of the commission, so that the passenger traffic at this station could be accommodated on regularly scheduled freight trains, and that the other traffic be cared for in the manner set out in the opinion of the commission.

Public Service Commission. No. 189, Complaint Docket.

TONE, Commissioner, November 18, 1914:

J. E. Callahan, C. G. Freeland and J. M. Little, as a committee representing the people at Kennard Station, complained that the Erie Railroad Company had discontinued the operation of passenger trains Nos. 219 and 220 between Greenville and Meadville, thus leaving the people at Kennard without passenger service and without means of forwarding fragile parcel post matter; and stating that the freight and passenger business were both increasing at this station; that it was the best paying station between Greenville and Meadville, and demanding that the railroad company maintain a station building and agent to accommodate and care for the traffic.

From the evidence submitted, it is found that Kennard is a community in Mercer County, having about twenty-five dwellings within a radius of one-half mile, and is a station on that portion of the main line of the Erie Railroad running north-

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easterly from Greenville to Meadville, the intermediate stations with distances of each, respectively, northeast of Greenville being, Kennard—4.9 miles, Atlantic—7.8 miles, Stony Point—13 miles, Geneva—19 miles, and Meadville, 26 miles; that Shenango is a station about two miles southwest of Greenville; that for some years previous to June, 1911, there was no passenger service furnished at Kennard Station; that from June to November, 1911, Kennard passengers were carried on a local freight train; that from November, 1911, to April 15th, 1914, passenger service was furnished by extending the run of a local passenger train previously operating between Leavittsburg, Ohio, and Shenango, Pennsylvania, northeasterly, from the latter point through Greenville, Kennard, Atlantic, etc., to Meadville, which operation between Shenango and Meadville was discontinued April 15th, 1914, from which time to May 15th, 1914, no passenger service was provided for Kennard, and from May 15th to the present time passengers have been carried between Greenville and Kennard on a local freight train, in each direction, once a day, scheduled to arrive at Greenville about 9:11 a. m., and depart at 2:10 p. m.; that this local freight was seldom operated on its schedule owing to delays caused by its handling and switching freight, and also by all other trains having the preference over the local freight; that the passenger service desired by the people of Kennard was accommodation to reach Greenville for one or two men before 7:00 a. m., for several scholars before 9:00 a. m., for others in time to transfer to a Bessemer and Lake Erie Railroad train leaving Greenville at 9:33 a. m. for Mercer, the county seat, and proper service for return trips the same day, the train from Mercer arriving at Greenville at 4:47 p. m.; that the local passenger train operating between Leavittsburg, Ohio, and Meadville, Pa., for the months of April, July and October, 1913, and January, 1914, earned about twenty-five cents per train mile, and its operation was discontinued between Shenango, Greenville and Meadville, in order to reduce operating expenses; that the average cost of operating passenger trains per train mile was estimated to be seventy-one and seventy-three hundredths cents; that for the calendar year 1913, the total receipts from Kennard passengers amounted to about \$381.06; the average number of passengers to and from Kennard riding in each direction on the local passenger train then operated was about three per day, and the passenger re-

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ceipts amounted during the same period, from and to the stations at Atlantic, to \$2,212.30; at Stony Point to \$145.05; at Geneva, to \$2,794.65; that for the fiscal year ending June 30th, 1914, the freight receipts on traffic to and from Kennard amounted to \$2,509.94 for outbound carloads, \$352.88 for inbound carloads, \$76.41 for outbound L. C. L., and \$202.65 for inbound L. C. L., a total of \$3,141.88; other freight receipts being, at Atlantic—\$3,284.20, at Stony Point—\$1,687.11, at Geneva—\$5,206.43; that more or less of the freight at the stations named was to or from points off the line of the Erie Railroad, requiring a division of the freight receipts with connecting carriers; that for the year ending September 1, 1914, the carload freight at Kennard Station comprised 12 cars of coal, 1 of salt, 1 of cement, 2 of fertilizer inbound, and 33 cars of lumber, 2 of cement block, and 116 cars of sand and gravel outbound; that delays occur in furnishing to the shipper of sand and gravel at Kennard, the weights of his shipments, the same being weighed at Shenango, thereby preventing his forwarding B-L's and invoices to customers; that there is confusion between the shippers and train crews regarding local outbound L. C. L. freight and express, and in the furnishing B-L's therefore, due in part to such shipments being subject to the direction of the railroad company's agents at both Greenville and Atlantic; that a freight car has been side-tracked at Kennard for use in storing in and out-bound freight and express; is locked and the key for same kept at the general store nearby of J. M. Little; that a room in a house near the station is provided by the railroad company for use by passengers waiting on trains; that the mails are carried on through trains, being thrown off and caught, without stop, three times per day at Kennard; that express and parcel post mail matter can be forwarded from Kennard by the shipper, notifying the railroad company's agents at Greenville or Atlantic; that no notice is sent to consignees of inbound freight received at Kennard; that the residents of the community surrounding Kennard for several miles in each direction are entirely dependent upon the Erie Railroad for freight and passenger accommodations.

The evidence indicates some lack of attention by the respondent to the necessities of shippers of freight and express and to the regularity of schedule in the operation of its train hauling passengers.

While the amount of the traffic is limited, the people about

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Kennard are entitled to reasonable and regular passenger service, and to proper facilities for and regular attention to their shipments of freight and express.

The respondent can adopt certain regulations, that, if made effective, will insure more prompt and systematic attention to outbound freight and express, to the returning of weights and issuing of bills of lading; and also that will, by relieving the local freight train of certain switching work, giving it some preference as to right-of-way, changing its schedule at starting point to allow it more time en route, insure its prompt arrival at Kennard and Greenville. If the respondent make effective such regulations, it is believed the necessity of an agent will be obviated, and that the passenger traffic will be accommodated without the re-instatement of the local passenger train between Shenango and Meadville.

It is the opinion of the commission, that, if the railroad company maintains the present car in proper order and condition for housing freight, has placed therein by its trainmen all inbound, and loaded therefrom all outbound L. C. L. freight and express, and continues the arrangement for use of a room in a neighboring house for sheltering passengers, a further station building and agent are not necessary; and that the railroad company should place all the freight and express business to and from Kennard under the direction of *one* of its agents, either at Greenville or Atlantic; require notices sent to consignees of inbound freight delivered to Kennard, and render promptly to shippers from that station bills of lading, and statements of weights of carload shipments; and further, that the railroad company shall carry passengers between Kennard and Greenville on its local freight train once per day, (Sundays excepted), in each direction, and operate said train on such a schedule that it will arrive at Greenville at 8:45 a. m., and leave Greenville at 5:10 p. m., thereby furnishing service to Kennard scholars attending school in Greenville, and residents of Kennard desirous of making a round trip during one day to Mercer, the county seat; and maintain a record of the time of arrival in the morning at and of departure in the afternoon from Greenville of said train.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and

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full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof :

Now, to wit, November 18th, 1914, it is ordered: That the Erie Railroad Company maintain its facilities and service at Kennard Station in accordance with the directions contained in the report of the commission above referred to, and so arrange its schedule as to carry out the directions of the commission contained in said report, and that the said railroad shall report to the commission once a month for six months a record of the time of arrival in the morning, at, and of departure in the evening from, Greenville, of the train mentioned in said report.

C. C. FISCUS *vs.* PHILADELPHIA AND READING RAILWAY COMPANY.

Common carriers—Passenger train service.

The complainants alleged inadequate passenger train service on the East Penn Branch of the respondent company, and also that the said service maintained between Allentown and Reading discriminates against Allentown in the number of trains and times when such trains are operated. *Held:* That under the facts as shown by the testimony, the present service is adequate, and no additional service should be required to be maintained by the company.

Public Service Commission. No. 245, Complaint Docket.

BRECHT, Commissioner, November 19, 1914:

The complainant in this proceeding sets forth that he is a resident of Mertztown, Berks County, Pa., engaged in the business of manufacturing rugs and carpets; that "in pursuance of the requirements of his business, he makes frequent trips to New York City"; that "although his place of business is only about one hundred miles from New York City," he is obliged, in order to reach home, to leave New York at 12:50 p. m., or else by taking the next train which leaves New York at 5:00 p. m., he is compelled to "go past his home to Reading, where the train arrives at 8:29 p. m., and then return east-

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ward to Mertztown, on the train leaving Reading at 8:37 p. m.;" that "frequently" the train from New York is a few minutes late, compelling him "to remain over night in Reading"; that "divers other persons living between Allentown and Reading are in the same situation as complainant;" and that service between Allentown and Reading discriminates against Allentown "in the number of trains and the time when such trains are operated."

The Chamber of Commerce of Allentown joined in this complaint, alleging that the schedule of train service maintained by respondent on the East Penn Branch "discriminates against the interests" of Allentown and "in favor of those of the city of Reading"; and asking for "train service during the middle of the afternoon and late evening, by which residents along the line of this railroad might come to this city for business purposes, and return to their homes at a reasonable hour."

The East Penn Branch of the Reading Railroad connects Allentown and Reading, and is 35.8 miles long. There are thirteen stations maintained on the line, and five local trains operated between Reading and Allentown each way daily except Sunday. From Topton, which is about half-way between Reading and Allentown, there are two additional trains each way to Allentown and return, thus giving all stations between Topton and Allentown seven trains each way. From Allentown there is also a half-hour trolley service to Macungie, 9.2 miles along the East Penn Branch, and from Reading, a trolley service every hour to Fleetwood, 11:3 miles more or less, paralleling the same road. There is no trolley service, or at least no convenient trolley service between Macungie and Fleetwood.

Mertztown is a small community of approximately several hundred people, on the East Penn Branch, 15.3 miles from Allentown, and 20.5 miles from Reading by rail. On week days there are seven trains for Allentown stopping at this point between 5:47 a. m. and 9:21 p. m.; and seven trains west as far as Topton, five of them being scheduled for Reading.

Trains from Reading after twelve o'clock noon making all stops reach Allentown at 1:35 p. m., 4:17 p. m. and 9:52 p. m., and from Kutztown, by way of Topton, at 5:37 p. m.; returning, local trains leave Allentown for Reading at 1:37 p. m. and 4:28 p. m., and for Kutztown, via Topton, at 6:08 p. m. The train leaving at 6:08 p. m. is the last train of the

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day over the East Penn Branch making local stops west of Allentown. It is with the late afternoon and evening trains over the East Penn Branch into and out of Allentown that this complaint is concerned.

The respondent railway company is petitioned (1), to provide train accommodations from the city of Allentown to Mertztown and other local points on the East Penn Branch after the train from New York reaches Allentown at 7:35 p. m., either by stopping the aforesaid express train at the various local stations, or by installing a local train to follow the express train about eight or half-past eight o'clock in the evening; (2), to give the residents living along the East Penn Branch the same train facilities to get to Allentown and back that is offered to them with respect to the city of Reading.

The train which arrives at Allentown at 7:35 p. m. from New York, and which complainant is asking to have stopped at local points between Allentown and Reading is known as train No. 9. This train leaves New York at 5:00 p. m., and is operated as a through express to Harrisburg, making the run in five hours and ten minutes. As the train is competing for through express traffic with Pennsylvania Railroad trains, some of which make the time between New York and Harrisburg in four hours and one-half, it cannot be expected to retain its proper share of the traffic and otherwise maintain its status as an express train, if required to make more frequent stops. Furthermore, this train also makes important connections at Reading with trains from Williamsport, Pottsville, and Philadelphia, and outbound trains to Pottsville, Tamaqua, Philadelphia and Allentown. To stop the train at points along the East Penn Branch would necessitate re-arranging this entire schedule of train connections at Reading, and more or less seriously affect schedules and train connections in the evening upon all the important lines of the respondent company. Under the circumstances, the request of complainant for this service must be denied.

It now remains to ascertain if a local passenger train should be installed to operate over the East Penn Branch from Allentown to Reading after 7:35 p. m. The complainant testified that he makes from thirty to forty trips a year to New York when he is put to inconvenience and expense in reaching home from Allentown by reason of the fact that such accommodations are not offered to the public; that he knew of three other

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persons living along the East Penn Branch who make frequent trips to New York and who are similarly situated; that a petition containing four hundred and twenty-eight names of residents along the East Penn Branch was handed to respondent last January, asking for a local train west out of Allentown in the evening. The record in this case also shows a list of names of business men who are said to be desirous for such services, but who did not personally appear and testify at the hearing. The secretary of the Chamber of Commerce of Allentown also testified that the merchants of Allentown "desire this later train from Allentown west to Reading."

There was no testimony offered at the hearing, however, to show to what extent people would take advantage of such train service in the evening, or to what extent the demand for it was based upon the needs of the community. The rather meager evidence placed upon the record can not be regarded as sufficient to warrant the commission in requiring the respondent to incur the expense of installing an additional train for service that is not more clearly and fully established by complainant.

It should be observed that residents along the East Penn Branch can reach New York City, have three hours for business, and return the same day, if they care to avail themselves of the morning service offered by respondent. There is a train leaving Mertztown at 5:57 a. m., which arrives at New York at 9:30 a. m.; and a return train which leaves New York at 12:30 p. m., making all stops at East Penn Branch points, and arrives at Mertztown at 4:59 p. m.

It is also contended by complainant that respondent offers better train accommodations over the East Penn Branch during the late afternoon and evening to Reading and return than to Allentown and return, thus discriminating in favor of Reading and against Allentown. There is nothing appearing on the record to show that Allentown has suffered any detriment in its business interests by reason of the fact that it did not have the later train service in the day.

Under the present schedule, the last train over the East Penn Branch, making local stops, leaves Allentown at 6:08 p. m. and runs as far west as Topton, and then proceeds to Kutztown, its destination. Since the stores of Allentown close at 5:30 p. m. except on Saturday evenings, persons residing east of Topton have ample time to make their trains after business

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hours. And since Tipton is half-way between Allentown and Reading, it does not seem probable that persons residing west of that point along the East Penn Branch would care to go to Allentown to shop and transact other business regularly, even if they could go and return on later trains.

Reading being the larger town, will naturally attract the business of the surrounding territory within a certain area. It appears from the record that the business from Tipton west is tributary to Reading, and from Tipton east more or less tributary to Allentown. No change in schedule of trains would likely affect this situation to any appreciable extent.

The commission is, therefore, of the opinion that the petition of complainant for additional train service on the East Penn Branch of the Reading Railroad should be refused, and the complaint be dismissed.

ORDER.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed of record a report containing its finding of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

Now, to wit, November 19, 1914, it is ordered: That the complaint in this proceeding be, and it is hereby dismissed.

CONSUMERS ELECTRIC COMPANY OF THE CITY OF PITTSBURGH,
APPELLANT, *vs.* THE PUBLIC SERVICE COMMISSION, RE-
SPONDENT, AND THE CITIZENS ILLUMINATING COMPANY,
INTERVENER.

*Public Service Commission—Appeal from finding, determina-
tion or order of.*

An appeal from a finding, determination or order of the Public Service Commission is properly taken within thirty days from the date of notice, by the commission, of the finding, determination or order from which the appeal is taken.

Rule to strike off appeal. C. P. Dauphin County, No. 168
Commonwealth Docket, 1914.

Consumers Electric Company *vs.* The Public Service Commission.

Ralph J. Baker, for rule.

W. L. Pace, contra.

McCARRELL, J., December 9, 1914.

The pending rule was granted upon the application of the intervener alleging that the appeal had not been taken within the time required by law. It is conceded that notice of the finding and determination of the commission was given to the defendant by registered mail on September 2, 1914, and that the appeal was taken within thirty days thereafter. The intervener contends that the appeal should have been taken within thirty days from July 21, 1914, the date of the finding and determination by the commission, and that notice of this finding and determination to the appellant was not necessary.

Article VI, section 17, P. L. 1913 (pp. 1424-25) provides that:

"Within thirty days after the filing of any finding or determination by the commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination or order, any party to the proceedings affected thereby may appeal therefrom to the court of common pleas of Dauphin County."

Article VI, section 13, P. L. 1913 (p. 1424), provides as follows:

"Every final order of the commission shall be served, in any county of the commonwealth, upon each public service company affected thereby, either by the marshal of the commission or by an adult person who may be deputized by said marshal for that purpose, in the manner now provided by law for serving a writ of summons upon individuals or corporations; and return of said service shall be made by the person serving said order to the secretary of the commission, in the manner and form now provided by law for making return of the service of a writ of summons; and a certified copy of said order shall be mailed by registered mail to all other parties to the proceedings in which such order is issued, or their respective attorneys."

Article VI, section 14, P. L. 1913 (p. 1424), provides that:

"After any finding, determination, or order shall have been

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made by the commission, any public service company or municipal corporation affected thereby, or any party complainant in the proceedings, or any person, corporation, or public service company, or association duly permitted by the commission, or proper petition and cause shown, to intervene, may apply, within fifteen days after the service of said order, for a rehearing in respect to any matter determined by the commission in or by its hearing or investigation and order issued therein; and the commission may grant and hold such rehearing, if in its judgment sufficient cause therefor be shown."

Article VI, section 1, P. L. 1913 (p. 1420), regulates the practice and procedure before the commission and provides that:

"All hearings before the commission or before any commissioner, shall be public; and all hearings, investigations, and proceedings by the commission shall be governed by such rules, not inconsistent with the act, as shall be adopted and prescribed by the commission."

On December 2, 1913, the Public Service Commission adopted its rules of practice and procedure, which will be found in 1 Penna. Corporation Reporter, pp. 21-44, and in the Appendix to 17 Dauphin County Reporter. By Rule 12 (p. 26) it is provided as follows:

"After hearing by the commission, a written finding, determination or order shall be made by it, either dismissing the complaint or directing the public service company or companies complained of to satisfy the cause of complaint, in the manner specified by the commission and authorized by law. The commission shall likewise make and file a written finding, determination or order in all hearings or investigations instituted on its own motion. Such final determination or order shall be filed of record by the commission and a copy thereof served on the parties entitled thereto, as required by law."

We have carefully considered the excellent brief submitted by counsel for the pending rule, and have examined the several sections of the Public Service Commission Act, in which the words "finding, determination or order" are used. The argument in support of the proposition that no notice of a finding or determination is legally required is plausible but not entirely convincing. The Public Service Commission by its rules of practice and procedure has interpreted the act as requiring notice of the findings and determinations, as well as of

orders. Such interpretation is not forbidden by the act, and does not appear to be inconsistent therewith. Indeed, it is in entire harmony with Article VI, section 14, which by necessary implication requires such notice. These rules, by the express language of Article VI, section 1 (*supra*), are to govern all hearings, investigations and proceedings by the commission. These rules distinctly provide for service of notice of findings, determinations or orders, and such service appears to have been made in the present case by registered mail, as permitted by law. The appellant, acting upon the faith of the rules of practice and procedure, took its appeal within the statutory period after the date of such service. We are of opinion that the appeal was taken in time and the pending rule to strike off the appeal is now dismissed at the costs of the intervener.

IN THE MATTER OF REQUIRING PUBLISHED RATES AND FARES
TO CONTINUE IN EFFECT FOR THIRTY DAYS.

*Public service companies—Tariffs—Change of published rates
or schedules—Excursions.*

A tariff or schedule, filed and posted, must be allowed to become effective and remain so for at least thirty days, before any change may be made therein, unless specific authority be granted by the commission, but this will not affect tariffs or schedules containing rates for excursions limited to certain designated periods under authority of General Order No. 4, of January 21, 1914.

Public Service Commission. Administrative Ruling No. 5, superseding Conference Ruling No. 1.

The Public Service Company law, approved July 26, 1913, Article II, section 1 (f), provides in part as follows:

"To make no change in any tariff or schedule which shall have been filed or published or posted by any public service company in compliance with the preceding sections, except after thirty days' notice to the commission and to the public, posted and published in the manner, form and places required with respect to the original tariffs or schedules, which shall plainly state the exact changes proposed to be made in the tariffs or schedules *then in force*, and whether an increase or decrease, and the time when the proposed changes will go into effect;" * * *

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The term "then in force" as employed in the paragraph above quoted must be interpreted as requiring that a tariff or schedule filed and posted must be allowed to become effective and remain in effect for at least thirty days before any change may be made therein, unless specific authority be granted by the commission, but this will not affect tariffs or schedules containing rates for excursions limited to certain designated periods under authority of General Order No. 4, of 21st day of January, 1914.

PAULINE M. BROCK *vs.* RALPH E. BROCK.

Divorce—Evidence—Competency of libellant.

In an action for divorce, the acceptance of service of notice of the time and place of hearing, by an attorney for the respondent, is not a personal service; and when the respondent does not appear and defend the libellant is incompetent as a witness, except as to the fact of marriage.

Libel in divorce. C. P. Dauphin County, No. 229, March Term, 1913.

E. E. Beidleman, for libellant.

W. Justin Carter, for respondent.

KUNKEL, P. J., December 14, 1914.

We cannot enter a decree of divorce on this record. The only testimony offered in support of the ground upon which the decree is asked is that of the libellant; and we do not think that she was a competent witness in the case except as to the fact of her marriage. There was no personal service of the subpoena upon the respondent. Service of the notice of the time and place of hearing was accepted by an attorney for the respondent. There was no appearance by the respondent for the purpose of making defense, there was no answer filed and no defense made. Under this state of facts it is quite clear that the libellant was not a competent witness for the purpose of establishing the ground upon which the decree of divorce is asked. The statute limits the libellant's competency to "those proceedings for a divorce in which personal service of the subpoena or of a rule to take depositions has been made on the

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opposite party or in which the opposite party appears and defends." The acceptance of service by counsel of the notice of the time and place of hearing is not a personal service, and when the respondent does not appear and make defense the libellant does not come within the exception to the statute which limits her competency as a witness. She remains incompetent except as to the fact of her marriage. The view we take is the same as that expressed in *Everhart vs. Everhart*, 16 Dist. 791; *Kesel vs. Kesel*, 16 Dist. 979; *Lyons vs. Lyons*, 30 C. C. 342.

We, therefore, hold the proceeding for the purpose of giving the libellant an opportunity to produce other testimony than her own or to make personal service of the time and place of hearing upon the respondent.

COMMONWEALTH *vs.* H. W. REBE.

*Cold storage foods—Withdrawal for purpose of sale—Return
—Act of May 16, 1913.*

The obvious meaning of section 17 of the Act of May 16, 1913, P. L. 216, is that food once in cold storage and released for the purpose of putting it on the market for sale shall not be again placed in cold storage.

The terms cold storage and cold storage warehouse are defined in the act. Cold storage is defined to be the storage of food at or below a temperature of forty degrees, Fahrenheit, in a cold storage warehouse. The term, cold storage warehouse, is defined to be an establishment employing refrigerating machinery or ice for the purpose of refrigeration, or a place otherwise artificially cooled, in which articles of food are stored for thirty days or more, at a temperature of forty degrees Fahrenheit or under.

Food taken out of cold storage for the purpose of sale cannot be said to be placed in cold storage again, unless placed in a cold storage warehouse falling within the definition of the act.

There is nothing in section 17 of the act that is intended to prevent food taken out of cold storage for the purpose of sale from being preserved pending its sale. It may not be placed in a cold storage warehouse, but there is nothing in the act that prohibits its preservation by proper temperature.

The words "any other similar warehouse," as used in this act, mean

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any other cold storage warehouse, and necessarily a cold storage warehouse within the definition of the act.

The period of thirty days or more, during which food is stored, is as much a part of the definition of a cold storage warehouse as is the degree of temperature at which the food stored is kept. Both time and temperature are essential elements of the definition.

A room artificially refrigerated to forty degrees or under, which is not licensed as a cold storage warehouse and in which foods are not kept for a longer period than twenty-nine days, is not a cold storage warehouse, within the meaning of the Act of May 16, 1913; and foods released from cold storage for the purpose of sale may be placed in such room, for preservation, until sold in the usual course of business, without violating the penal provisions of the act.

Judgment on special verdict. Q. S. Dauphin County, No. 201, January Sessions, 1914.

FINDINGS OF FACT.

Now, January 16th, 1914, we, the jury in the above stated case, having been called and sworn, do find the following facts in the nature of a special verdict, viz:

The defendant is the assistant manager of the Brelsford Storage and Packing Company, a corporation, doing business in the city of Harrisburg, Dauphin County, State of Pennsylvania, and as such assistant manager had charge of and directed the action of the said corporation relative to the handling of and storage of the twenty-eight (28) cases of cold storage eggs mentioned in the indictment.

The said twenty-eight cases of eggs were placed in cold storage on the sixth day of September, A. D. 1913, in the cold storage warehouse of Swift & Company, in the city of Chicago, in the State of Illinois. The said eggs remained in cold storage at the warehouse aforesaid until on or about the third day of January, A. D. 1914, when the said eggs were sold by Swift & Company to the Brelsford Storage and Packing Company aforesaid, and were thereupon withdrawn from cold storage by Swift & Company for the purpose of sale and were stamped with a diamond in accordance with the Regulation No. 32 of the Rules and Regulations for the enforcement of the Cold Storage Act of 1913, promulgated by the dairy and food commissioner of the State of Pennsylvania, under the provisions of the said Act of 1913. After withdrawal from cold storage

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the said eggs were shipped by Swift & Company at Chicago to the Brelsford Storage and Packing Company at Harrisburg aforesaid, and were received in due course on January 6, 1914.

The Brelsford Storage and Packing Company is engaged in the business of selling and marketing eggs, meat, butter and other food commodities. The said company operates a warehouse in the city of Harrisburg aforesaid. One room in said warehouse is a licensed cold storage warehouse under the provisions of the Cold Storage Act of May 16, 1913, and its supplement. The balance of said warehouse is not licensed as a cold storage warehouse.

On the receipt of said eggs from Swift & Company the said eggs were by direction of defendant placed in room No. 13, in the warehouse of the Brelsford Storage and Packing Company; said room is not the room licensed as a cold storage warehouse; said licensed room is room No. 6 in the said warehouse.

On January 7, 1914, the warehouse of the said Brelsford Storage and Packing Company aforesaid, was, in the course of his usual duties, visited by C. C. Linton, as agent of the dairy and food commissioner of the State of Pennsylvania. Upon an examination of said warehouse, room No. 6, being the licensed cold storage warehouse in said establishment, was found to have a temperature by reason of artificial refrigeration of thirty-four (34) degrees Fahrenheit. The twenty-eight cases of eggs hereinbefore mentioned were found not in the licensed cold storage room aforesaid, but in room No. 13 in said establishment, and the temperature in said room on the date aforesaid was found by said agent to be thirty-three (33) degrees Fahrenheit, which temperature was produced by artificial refrigeration. In room No. 13 the temperature is kept by artificial refrigeration at forty (40) degrees and under, but no food is kept in said room for a longer period than twenty-nine (29) days, and said room is not licensed as a cold storage warehouse. The eggs heretofore mentioned were placed in said room No. 13 by direction of defendant and held therein by his direction for the purpose of keeping the same until the same should be sold in the usual course of business.

If under the above-stated facts the court be of opinion that the defendant has violated the law as charged in the indictment, then we find the defendant guilty in manner and form as indicted.

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If, however, under the above-stated facts the court be of opinion that the defendant is not guilty of a violation of law as charged in the indictment, then we find defendant not guilty.

M. E. Stroup, District Attorney, *Wm. M. Hargest*, Second Deputy Attorney General, and *A. H. Woodward*, for plaintiff.

H. L. Lark and *M. W. Jacobs*, for defendant.

KUNKEL, P. J., December 14, 1914.

The question presented arises on the construction of that part of section 17 of the Cold Storage Act of May 16, 1913, P. L. 216, which reads as follows: "After food has been withdrawn from a cold storage warehouse, for the purpose of placing it on the market for sale, it shall be unlawful for any person, firm or corporation to return such food, or any portion thereof, to such warehouse or any other similar warehouse." The obvious meaning of the section is that food once in cold storage and released for the purpose of putting it on the market for sale shall not be again placed in cold storage. The terms "cold storage" and "cold storage warehouse" are defined in the act itself. "Cold storage" is defined to be "the storage of food at or below a temperature of forty degrees Fahrenheit, in a cold storage warehouse," and the term "cold storage warehouse" is defined to be "an establishment employing refrigerating machinery or ice for the purpose of refrigeration, or place otherwise artificially cooled, in which articles of food are stored, for thirty days or more, at a temperature of forty degrees Fahrenheit or under." It would thus appear that food which has been taken out of cold storage for the purpose of sale cannot be said to be placed in cold storage again unless placed in a cold storage warehouse falling within the definition of the act. The purpose of section 17 was manifestly to prevent food that had been withdrawn from cold storage for sale and had become deteriorated and possibly unfit for human food from being again placed in cold storage, and afterwards taken out and sold. We can find nothing in the section intended to prevent food taken out of cold storage and placed upon the market for sale from being preserved pending its sale. It may not be placed in a cold storage warehouse, but there is nothing in the act, as we read it, that prohibits its preservation by proper temperature from deterioration and waste.

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The parties to this dispute attempt to gather the meaning of section 17 from the definition of the word "similar" in the phrase "or any other similar warehouse," the commonwealth contending for a liberal and the defendant insisting on a strict interpretation. If a liberal interpretation be given the section would mean that the warehouse to which the food is returned must be similar, not in all respects but in some respects, to the warehouse from which it was withdrawn. If a strict interpretation be adopted, "any other similar warehouse" would mean any other warehouse similar in all respects to the warehouse from which the food was released. However, this method of construing the section would practically thwart its purpose and would impose a burden upon the commonwealth which we do not believe the legislature ever intended. Thus food withdrawn from a cold storage warehouse in any other state, differing from a cold storage warehouse as defined by the act, and placed in cold storage in a warehouse in this state, could not be said, under a strict interpretation, to be returned to a similar warehouse. And in every prosecution for violating the section, the similarity, wholly or in part, of the warehouse to which the food was returned to the warehouse from which it had been withdrawn, would have to be shown. In the present case there is no finding in this particular. But if the word "similar" is interpreted as describing the kind of a warehouse meant and as distinguishing it from warehouses used for purposes other than for cold storage, then it is clear that "any other similar warehouse" means any other cold storage warehouse, and necessarily one within the definition of the act and recognized as such in this state. This, we think, is the significance of the word "similar." It is used not as descriptive of any particular warehouse, but as indicative of the kind of a warehouse to which the food withdrawn may not be returned.

The statutory definition of a cold storage warehouse, as we have seen, is "an establishment employing refrigerating machinery or ice for the purpose of refrigeration, or a place otherwise artificially cooled in which articles of food are stored, for thirty days or more, at a temperature of forty degrees Fahrenheit or under." The period of thirty days or more during which food is stored is as much a part of the definition of a cold storage warehouse as is the degree of temperature at which the food stored is kept; and one element of the definition could be just as readily eliminated from it as the other.

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It could hardly be contended that, if food released from cold storage for the purpose of sale would be placed and kept for thirty days or more in an establishment artificially cooled at a temperature of more than forty degrees, it was placed in a cold storage warehouse. No more can it be said that the placing of food for less than thirty days in an establishment artificially cooled at or below a temperature of forty degrees Fahrenheit is placing it in a cold storage warehouse. Both time and temperature are essential elements of the definition.

We are of the opinion that the phrase "or any other similar warehouse," used in section 17, means any other cold storage warehouse, that is, a cold storage warehouse as defined by the act. By this construction the purpose of the law to protect the public from the sale of unwholesome food is accomplished, and the right of the owner to keep cold storage food on the market for sale from deterioration and waste is preserved.

The jury has found: "In room No. 13 the temperature is kept by artificial refrigeration at forty degrees and under, but no food is kept in said room for a longer period than twenty-nine days, and said room is not licensed as a cold storage warehouse. The eggs heretofore mentioned were placed in said room No. 13 by direction of defendant and held therein by his direction for the purpose of keeping the same until the same should be sold in the usual course of business." It thus appears that room No. 13 does not fall within the statutory definition of a cold storage warehouse and that the eggs were not placed therein for cold storage, but for the purpose of keeping them until disposed of by sale, there being no intention in any event to keep them there for a longer period than twenty-nine days.

Wherefore, in accordance with the terms of the special finding, we direct a verdict of not guilty to be entered in the case.

HOME GERMAN BAU UND SPA VEREIN, OF HARRISBURG, PA.,
vs. H. HOMER MATTER.

Building and loan associations—Loans—Competitive bidding.

Where there has been no competitive bidding for a loan from a building and loan association, the association will be limited in its recovery to the sum of money actually loaned, with legal interest thereon.

A bid by an officer of a building and loan association, who has no intention to borrow and who simply bids to raise the premium, does not constitute competitive bidding within the meaning of the acts of assembly regulating such associations.

Rule to open judgment. C. P. Dauphin County, No. 496, June Term, 1914.

H. H. Matter, for rule.

H. B. Saussaman, contra.

McCARRELL, J., December 18, 1914.

The plaintiff is incorporated under the General Corporation Act of 1874 as a building and loan association. This act expressly provides that the money of the association "shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan of not more than the amount fixed by charter as the full value of a share for each share of stock held by such stockholder." The petitioner alleges that the money was loaned to the defendant in this case without any competitive bidding as required by law. From the answer, replication and depositions it appears that the only bid when the loan was made was by an officer, who did not want to borrow, but wished to raise the premium. Apparently the plaintiff has by by-law or otherwise fixed a minimum premium of \$40 per share. The papers submitted clearly indicate that there has been no lawful competition in the making of the loan to this defendant. The language of the Act of 1874 relating to the incorporation of building and loan associations is quite similar to that of the earlier Act of 1859 on the same subject. This language has been judicially considered in a number of cases. In *Stiles' Appeal*, 95 Pa. 122, it is held that building associations are bound to offer all that is in the treasury to open competition so that members may obtain a loan at a

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low premium if there should be no bid at a higher. In *Roeser vs. German National Building and Loan Association*, 32 Superior Court 100, the lower court, the opinion of which was affirmed, held that the Act of June 4, 1901, P. L. 403, made no change in the method of making loans, the language of the court being as follows:

"We do not think the act permits the money to be loaned at a premium unless there is competitive bidding. It may have been intended to do away with competition, and so meet the condition in *Stiles' Appeal* and the other cases since that time. It does authorize submission of bids in writing, but does not authorize the practice of fixing a minimum premium, and receiving no bids below that, or of awarding the money at the premium bid, unless there were no other bids either in writing or by *viva voce* made for the money. In short, it does not warrant the charge of a premium unless there was competitive bidding."

The language used by Chief Justice Sharswood in *Stile's Appeal*, 95 Pa. 122, is declared to be as true to-day as when written. The same principle has been recognized in all the cases, the latest of which is *Kline vs. Pennsylvania Saving Fund Association*, 216 Pa. 516. At page 522, Mr. Justice Mes-trezat thus interprets the Act of 1874:

"Our Act of 1874, under which the defendant was incorporated, points out explicitly the manner in which the business of such associations shall be conducted, and protection of needy borrowers requires the courts to compel a strict compliance with its provisions. The language of the act is mandatory as to the manner in which loans shall be made, and provides that the money of the association shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference of priority of loan shall be entitled to receive a loan. Failing to observe this positive command of the statute the defendant association cannot invoke the aid of its charter to protect it from the penalty of usury."

In the light of these decisions we are of opinion that the defendant is entitled to make defense upon the ground set forth in his petition. If he can show that there was no competitive bidding with respect to his loan, the association will be limited in its recovery to the sum of money actually loaned with legal interest thereon.

The pending rule is, therefore, made absolute and the judgment opened so that he may make defense upon the ground stated in his petition.

APPENDIX

Rules of Practice and Procedure

OF

The Public Service Commission

OF THE

Commonwealth of Pennsylvania

RULE 1.

Principal Office.

The principal office of the Commission shall be in the Capitol Building in the City of Harrisburg, and shall be open for business between the hours of 9 A. M. and 5 P. M. every day, legal holidays and Sundays excepted.

RULE 2.

Sessions and Meetings of Commission.

The stated meetings of the Commission will be held in the office of the Commission in the Capitol, in the City of Harrisburg, on the *first* and the *third* Tuesday of every month, holidays excepted.

Sessions and meetings of the Commission may be held at any time and at any place in the Commonwealth, whenever, in the judgment of the Commission, the public necessity or convenience may require.

RULE 3.

Information.

The Secretary of the Commission will, upon request, advise as to the form of complaint, petition, answer or other documents necessary to be filed in any proceeding before the Commission, and furnish such other information to the public and to public service companies as may, from time to time, be directed by the Commission.

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RULE 4.**Miscellaneous.**

(a) All complaints and all petitions and answers in any proceeding or applications in relation thereto, and all letters and telegrams, or other communications, to the Commission, must be addressed "The Public Service Commission of the Commonwealth of Pennsylvania," at Harrisburg, Pennsylvania, unless otherwise specially directed.

(b) The Secretary shall assign to each formal proceeding a year and number, which the parties shall, before filing, place on all subsequent papers in such proceeding.

(c) Any party to a proceeding may appear before the Commission and be heard in person or by attorney.

RULE 5.**Complaints.**

No particular form of complaint is required, except that, as provided in the Public Service Company Law, it must be by petition, in writing, duly verified by the affidavit of the complainant, and shall contain a concise statement of all the material facts upon which the complaint is founded.

Said complaint must also set forth the name and post office address of the public service company complained against, the full name and post-office address of the complainant, with the full name and address of the attorney or counsel, if any, of such complainant.

If a violation of any statute, or of a ruling or order of the Commission, is complained of, attention should be called to the section of the statute or the particular ruling or order of the Commission.

At the time of the filing of any complaint, or of any petition, application or other communication, invoking the jurisdiction of the Commission, there shall be filed with the original, for the use of the Commission and of the adverse party or parties, if desired, copies thereof, equal in number to three copies for each party to the record.

A copy of the complaint will be forwarded by the Commission to each of the public service companies complained of, by registered mail, accompanied by a notice from the Commission, calling upon the public service company or companies complained of to satisfy the complaint, or to answer the same in writing, within fifteen days or within such other time, greater

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or less than fifteen days, as in the judgment of the Commission, the circumstances of the case may require.

All papers filed with the Commission shall be written on one side of the sheet only.

RULE 6.**Satisfaction of Complaint and Answer.**

The public service company or companies complained of shall satisfy the complaint, or make answer thereto, within the time specified in said notice. If the complaint is satisfied, both the complainant and the respondent shall notify the Commission thereof promptly, and give the manner or terms of such satisfaction.

In such event the Commission may dismiss the complaint and make a record thereof and no further action need be taken.

RULE 7.**Answers.**

The original answer of the public service company or companies complained of must be verified by affidavit and filed with the Commission, and must specifically admit or deny the material allegations of the complaint. If any or all of the allegations of the complaint are denied, the answer must set forth the facts as they are claimed to be by the party answering.

Copies of said answer, equal in number to three copies for each party to the record, shall be filed with the original, with the Commission, for the use of the Commission, and the adverse party or parties, and one copy shall be served by the Commission on the adverse party by registered mail.

RULE 8.**Hearings upon Complaint.**

If satisfaction of the complaint be not made, as aforesaid, then after the expiration of the time allowed for answer, and whether the answer has been filed or not, the Commission will determine from a consideration of the complaint and answer, or otherwise, whether reasonable ground exists for investigating said complaint, and if, in the judgment of the Commission, such reasonable ground exists, then it shall fix a time and place for a hearing and investigate the matter complained of.

Notice of the time and place of such hearing shall be given

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to the complainant and to the public service company or companies complained against, by registered mail, and the proceedings thereafter will be in accordance with these rules and as the Commission shall from time to time direct.

The cost of, or in connection with, any hearing had upon any complaint, found by the Commission to be without reasonable foundation and made improvidently or from improper motives, will be placed upon the complainant.

RULE 9.**Practice on Hearings.**

The complainant must, in all cases, establish the facts alleged to constitute a violation of the law, unless the respondent admits the same, or fails to answer the complaint, except that where the complaint alleges the violation of a lawful determination, ruling or order of the Commission, the burden of proof shall be upon the public service company complained of to show that such determination, ruling or order has been complied with. The respondent must also give evidence of the facts alleged in the answer unless admitted by the complainant, and must fully disclose its defense at the hearing.

Witnesses will be examined orally before the Commission, unless the facts be agreed upon in writing. The testimony will be taken down by the stenographer, and a full and complete record kept of all such proceedings before the Commission or any Commissioner. In case of failure to answer, or to serve notice in nature of demurrer hereafter mentioned, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such finding, determination and order thereon as the circumstances of the case appear to require.

RULE 10.**Notice in Nature of Demurrer.**

Any public service company or companies complained against deeming the complaint insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the complainant and on the Commission its claim of such insufficiency, and in such case the facts stated in the complaint will be deemed to be admitted.

Upon receiving such notice the complainant shall make such reply thereto as he may desire, and serve a copy thereof on

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the respondent and file a copy with the Commission, and thereupon the Commission will determine the legality of the complaint and notify the parties of such decision, and whether any further action is deemed proper or necessary.

Said notice in nature of demurrer must be filed and served by the respondent within fifteen days of the service of the complaint, and said reply of the complainant, if any, must be filed and served within a like period after the notice is served.

RULE 11.**Investigation by Commission on its own Motion.**

The Commission may, at any time, of its own motion, make investigations and order hearings as to any act or thing done, or omitted to be done, by any public service company which to the Commission seems to be in violation of any provision of law, or of any order or rule of the Commission.

RULE 12.**Finding, Determination or Order.**

After hearing by the Commission, a written finding, determination or order shall be made by it, either dismissing the complaint or directing the public service company or companies complained of to satisfy the cause of complaint, in the manner specified by the Commission and authorized by law.

The Commission shall likewise make and file a written finding, determination or order in all hearings or investigations instituted on its own motion.

Such final determination or order shall be filed of record by the Commission and a copy thereof served on the parties entitled thereto, as required by law.

RULE 13.**Re-Hearings.**

Applications for re-hearings shall be by petition verified by affidavit which must be filed within fifteen days after the service of the order of the Commission, or within fifteen days after the delivery, by registered mail, of the notice of the finding, or determination, of the Commission.

Notice of such petition shall be served by the petitioner on each party to the proceedings before the Commission, by mailing by registered mail to said party a copy of said petition.

If said petition is granted, notice of the time and place of

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the rehearing will be given by the Commission to each party to the record, by registered mail.

Said petitions for re-hearing shall state specifically the grounds upon which the application is based. If the application is to reopen the case for further evidence, the nature and purpose of the evidence and the reason why it was not adduced on the original hearing must be stated, and the same must not be cumulative merely. If the application alleges error in findings of fact or conclusions of law the alleged error must be particularly stated with the specific grounds for the allegation of error.

When any decision, order or requirement of the Commission is sought to be rescinded, changed or modified, by reason of facts and circumstances arising subsequent to the hearing, or to the order, or by reason of consequences resulting from compliance with such finding, order or requirement, which are claimed to justify or entitle a rescission, change or modification thereof, such facts and circumstances or consequences must be fully set forth in the petition.

Such petitions shall conform to the requirements hereinafter stated in *Rule 23*, as applicable to all petitions filed with the Commission.

RULE 14.**Amendments.**

Amendments to any complaint, petition, answer or other paper filed in any proceeding or investigation may be allowed by the Commission, in its discretion.

RULE 15.**Adjournment and Extensions of Time.**

Adjournment and extensions of time may, in the discretion of the Commission, be granted upon the application of any party. Applications for extension of time of hearing shall be accompanied by an affidavit showing a necessity therefor.

RULE 16.**Stipulations.**

The parties to any hearing, investigation or other proceeding before the Commission, may, by stipulation, in writing, filed with the Commission, agree upon the facts, or any of the facts involved therein, which stipulation shall be regarded and

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used as evidence at such hearing, investigation or other proceeding. It is desirable that the facts be thus agreed upon whenever practicable. The Commission may, nevertheless, require such additional evidence or information as it may deem necessary, and as may be authorized by law.

RULE 17.**Dismissal for Failure to Prosecute Complaint.**

Whenever the complainant in any case refuses or neglects to furnish the Commission with additional information, or to perform any act regarded by the Commission as necessary or desirable for the proper and further elucidation, investigation or prosecution of the case, for a period of fifteen days after being requested so to do, the Commission may forthwith dismiss the case, unless in its opinion it is of sufficient public interest and concern to demand its further prosecution and determination, in which event subsequent proceedings may be conducted as if the case had been instituted by the Commission.

RULE 18.**Subpœnas.**

All subpœnas issued by the Commission shall be under the seal of the Commission, signed by a Commissioner or the Secretary of the Commission.

RULE 19.**Depositions.**

The testimony of any aged, infirm, going or non-resident witness may be taken by deposition at the instance of a party to any proceeding or investigation before the Commission. The Commission may order the testimony of any such witness to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such deposition may be taken before any Notary Public, or any other person authorized to administer an oath, as provided by the laws of this Commonwealth, not being counsel or attorney to any of the parties, or otherwise interested in the proceeding or investigation. The same notice of taking depositions that is required by the Pennsylvania Equity Rules in taking depositions in civil cases must be given, in writing, by the party or his attorney proposing to take such deposition, to the opposite party or attorney of record, which notice shall

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state the name of the witness, and the time and place of the taking of his deposition, and like notice shall also be given the Secretary of the Commission. Provided, however, that not less than forty-eight hours notice shall be given in any case.

Every person whose deposition is taken shall be sworn or affirmed and the testimony shall be reduced to writing or typewriting by the officer taking the deposition, or under his direction, and shall be subscribed by the witness and attested by said officer.

RULE 20.**Briefs.**

Upon all contested hearings, unless otherwise specially ordered, printed briefs containing legal arguments and citations of cases relied upon shall be filed on behalf of the parties. They shall contain an abstract of the evidence relied upon by the party filing the same, and, in such abstract, reference shall be made to the pages of the notes of testimony where the evidence appears. The abstracts of the evidence shall follow the statement of the case and precede the argument. Briefs shall be filed with the Commission and served upon the adverse party or parties by the complainant, within fifteen days after the receipt of copy of the testimony where the same is ordered, otherwise, after the same has been concluded, and by the other party or parties, within ten days after receipt of complainant's brief and the complainant shall have five days additional time for reply. Different times may be specially ordered in any case. Ten copies of each brief shall be filed for the use of the Commission with the Secretary, and shall be accompanied by advice of the date and manner of service upon the adverse party. At least three copies shall in each case be served upon the adverse party or parties. Briefs and other papers shall be printed and shall be nine (9) inches long and six (6) inches wide, with a margin of not less than one (1) inch, except in special cases, when, in the opinion of the Commission printing is impracticable, upon special order they may be typewritten.

RULE 21.**Service and Effect of Orders.**

The manner of service, and effect of orders of the Commission, shall be as specifically prescribed by The Public Service Company Law.

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RULE 22.**Financial Condition. Term as used in these Rules Defined.**

Whenever a corporation, subject to The Public Service Company Law, is required or called upon to disclose its financial condition, such financial condition shall be given, so far as practicable, in appropriate schedules annexed to, and referred to, and properly designated in, the petition. Such schedules shall show the following:

1. Date of incorporation and under what law or laws.
2. Amount and kinds of stock authorized.
3. Amount and kinds of stock issued.
4. Terms of preference of all preferred stock.
5. Brief description of each mortgage upon property of the corporation, giving date of execution, name of trustee, amount of indebtedness authorized to be secured thereby, and amount of indebtedness actually secured and outstanding, and brief description of the mortgaged property or collateral.
6. Number and amount of bonds authorized and issued, describing each class separately, giving date of issue, par value, rate of interest, date of maturity, and how secured.
7. Other indebtedness of all kinds, giving same by classes and describing security, if any.
8. Amount of interest paid during previous fiscal year, and rate thereof, and if different rates were paid, amount paid at each rate.
9. Amount of dividends paid during previous fiscal year, and rate thereof, and statement of the Profit and Loss Account for the last five years previous to the filing of such statement.
10. Classified statement of earnings and expenditures for the previous fiscal year, and balance sheet showing condition at close of the year, and such additional information as the Commission may at any time require.

RULE 23.**Applications.—General Requirements.**

All applications must be by petition, in writing, signed and duly verified by the applicant, and shall in all respects conform to the specific requirements of the rules governing any particular application.

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The petition must set forth the name and post office address of the applicant, and must show the name and address of its attorney, if any, and must contain a clear statement of the facts on which the application is based, with a request for the finding, determination, order, approval or certificate desired, and a reference to the particular provision of the law requiring or providing for the same.

Three copies of the petition shall be filed with the original.

The petition must contain such further statements as may be required by any provision of law, or of these rules, and must show in detail compliance therewith.

If maps, profiles or plans are filed with the petition, they must always be filed in triplicate, and one copy thereof shall be on tracing linen, unless waived by the Commission.

Whenever, under any of these rules, any map, profile, plan, certificate, statement or other document is required to be filed with a petition, and the same has theretofore been filed with the Commission, the petition may state the fact of such filing, with the date and the proceeding in which, or occasion on which, the filing was made.

RULE 24.

Application by a proposed public service company for approval of incorporation and of beginning of the exercise of any right, power, franchise or privilege under Article 3, Sections 2 (a) and (b), and Article V, Sections 18 and 19, of The Public Service Company Law.

Applications made to the Commission by any proposed public service company for a certificate of public convenience evidencing the Commission's approval of the incorporation, organization or creation of such company, and of the beginning of the exercise of any right, power, franchise or privilege under Article 3, Section 2, (a) and (b), and Article 5, Sections 18 and 19 of The Public Service Company Law, shall be by petition duly verified by the petitioner, and said petition shall, in addition to the requirements of Rule 23, contain and embrace as part thereof—

- (1) A certified copy of the certificate of incorporation.
- (2) A certified copy of the right, power, franchise or privilege under any ordinance, municipal contract or otherwise.

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- (3) The financial condition of the applicant as defined in Rule 22.
- (4) The manner in which it proposes to finance the proposed exercise of the right, power, franchise, or privilege.
- (5) The nature and character of the service, a detailed description of the locality to be served, and maps and profiles showing the streets, avenues and all other places, locations, and property in or upon or along which it is proposed to exercise such right, power, franchise, or privilege.
- (6) The name and location of the principal office, plant, and facilities of every public service company with which the proposed company may compete.
- (7) A detailed statement of the facts relied upon by the petitioner to show that the proposed incorporation or beginning of the exercise of the right, power, franchise, or privilege, is necessary and proper for the service, accommodation, convenience, or safety of the public.
- (8) An affidavit of at least two directors that it is the intention of the applicant to begin providing service within a time specified.
- (9) A certificate from the Secretary of the Commonwealth to the effect that all existing laws relative to the incorporation, organization, and creation of such proposed public service company, have been complied with.
- (10) The facts showing that the approval applied for is necessary or proper for the service, accommodation, convenience or safety of the public.

RULE 25.

Application by a Municipal Corporation for a Certificate of Public Convenience, under Article III, Section 3-(d), and Article V, Sections 18, 19, of The Public Service Company Law.

Application by a municipal corporation for a Certificate of Public Convenience, under Article III, §3-(d) and Article V, §§18, 19, of The Public Service Company Law, to acquire, construct, or to begin to operate any plant, equipment or other facilities for the rendering or furnishing to the public of any

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service of the kind or character already being rendered or furnished by any public service company within the municipality, shall be duly verified by the petitioner and shall, in addition to the applicable requirements of Rule 24, contain or embrace as part thereof:

1. The name and location of the principal office and plant, equipment, or facilities of every public service company rendering like service within the municipality.

2. The names of the executive officers of such public service company, or companies.

3. A general statement of the amount and character of service rendered within such municipality by such public service company or companies.

4. A description, accompanied by maps, profiles, etc., of the plant equipment, or other facilities proposed to be acquired, constructed, or operated.

5. The manner in which it proposes to pay for, or finance the acquisition, construction and operation of the proposed plant, equipment or other facilities.

6. The facts showing that the approval applied for is necessary or proper for the service, accommodation, convenience or safety of the public.

7. The name of each and every corporation with which the proposed exercise of the right, power, franchise or privilege may compete.

RULE 26.

Application by a Public Service Company for a Certificate of Public Convenience, under Article III, § 3 (a), and Article V, §§ 18, 19, of The Public Service Company Law, to Renew its Charter or Obtain any Additional Rights, Powers, Franchises, or Privileges, by any Amendment or Supplement to its Charter or Otherwise.

When application is made by any public service company for a Certificate of Public Convenience, under Article III, §3-(a), and Article V, §§ 18, and 19, of The Public Service Company Law, to renew its charter, or obtain any additional rights, powers, franchises, or privileges, by any amendment or supplement to its charter, or otherwise, the petition shall, in addition to the requirements of Rule 24, contain and embrace as part thereof:

1. A certified copy of the charter, and all amendments or supplements thereto, of the applicant, if one has not thereto-

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fore been filed with the Commission, and a reference to the statute or statutes under which said company has been incorporated, with date of incorporation.

2. If the additional right, power, franchise or privilege is proposed to be obtained by any amendment or supplement to its charter, a certificate from the Secretary of the Commonwealth to the effect that all existing laws relative to such amendment or supplement to its charter have been complied with.

3. If the additional right, power, franchise or privilege is proposed to be obtained otherwise than by amendment or supplement to the charter of the public service company, a certificate from the proper municipal or other governmental authority to the effect that existing laws, ordinances, or other governmental requirements have been complied with.

4. The facts showing that the approval applied for is necessary or proper for the service, accommodation, convenience or safety of the public.

RULE 27.

Application by a Foreign Public Service Company for a Certificate of Public Convenience, under Article III, Section 3-(b), and Article V, Sections 18 and 19, of The Public Service Company Law, to obtain the Right to do Business within this Commonwealth.

When application is made by a foreign public service company for a Certificate of Public Convenience, under Article III, §3-(b), and Article V, §§ 18 and 19 of The Public Service Company Law, to authorize such foreign public service company to do business within this Commonwealth, the petition shall contain and embrace as part thereof all the requirements of Rules 22, 23, and 24.

RULE 28.

Applications by a Public Service Company for a Certificate of Public Convenience, under Article III, § 3-(c), and Article V, §§ 18 and 19, of The Public Service Company Law, to Sell, Assign, Transfer, Lease, Consolidate, or Merge its Property, Powers, Franchises or Privileges, or any of them, to or with any other Corporation or Person.

When application is made by a public service company for a Certificate of Public Convenience, under Article III, §3-(c)

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and Article V, §§ 18 and 19 of The Public Service Company Law, to sell, assign, transfer, lease, consolidate or merge its property, rights, franchises or privileges, or any of them, to or with any other corporation or person, the petition shall, in addition to the requirements of Rule 24, contain and embrace as part thereof:

1. A certified copy of the charter, with all amendments and supplements thereto, of each corporation party to the transaction, or affected thereby, if not theretofore filed with the Commission, and a reference to the statute or statutes under which such corporations have been incorporated, and dates of incorporation.

2. The financial condition of the applicant and each corporation party to the transaction, as such financial condition is defined in Rule 22, and a statement of the manner in which the proposed consolidated corporation is to be capitalized and financed.

3. In detail, the reasons upon the part of each applicant for making the proposed sale, assignment, transfer lease, consolidation, or merger, and the facts showing that the transaction, the approval of which is sought, is necessary or proper for the service, accommodation, convenience or safety of the public, and all other facts which should be known by the Commission, to enable it to pass upon the application. Such petition shall be joined in by all the parties to the proposed transaction.

4. The originals of all contracts of sale, assignment, lease, consolidation, or merger, and of all other writings or documents which form a part of, or in any manner affect, the proposed transaction, together with one copy, certified by the parties thereto, of each of such contracts, writings, or documents, and a copy of any and all franchises or privileges that may be involved in such transaction, certified to be such by the proper governmental authorities granting the same.

RULE 29.

Applications for Certificate of Public Convenience to Purchase, Acquire, Take or Hold, in Absolute Ownership or in Pledge, a Controlling Right, Title, or Interest in another Public Service Company, under Article III, §6-(c), and Article V, §§ 18 and 19, of The Public Service Company Law.

When application is made by any public service company

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for a Certificate of Public Convenience to purchase, acquire, take, or hold, either in absolute ownership or in pledge, a controlling right, title, or interest in any other public service company, under Article III, §6-(c), and Article V, §§ 18 and 19 of The Public Service Company Law, the petition must be made by the public service company proposing to purchase, acquire, take, or hold, and must, in addition to the requirements of Rule 24, contain and embrace as part thereof.

1. The financial condition (defined in Rule 22) of the applicant and of the corporation, the purchase, acquisition, taking or holding of the controlling right, title or interest in which the approval of the Commission is sought.

2. The reasons why the applicant desires to purchase, acquire, take, or hold the controlling right, title or interest, and the amount of the stock or securities, or the nature and extent of the right in such other public service company already owned or held by the applicant if any.

3. The price proposed to be paid for such controlling right, title, or interest, the terms and manner of payment, the market value of the stock or other securities representing such controlling right, title, or interest, and the highest and lowest price for which such stock or other securities sold during the period of at least one year immediately prior to the application, together with the dividends or income thereon, if any, paid for a period of five years immediately prior to such application.

RULE 30.**Long and Short Transmission of Telegraph and Telephone Messages.**

When application is made by a telegraph or telephone company for a Certificate of Public Convenience to charge less for a longer than for a shorter distance service for the transmission of messages or conversations over the same line or route, in the same direction, under the provisions of Article III, §10, and Article V, §§ 18 and 19, of The Public Service Company Law, the petition, in addition to the requirements of Rule 23 must contain and embrace as part thereof:

1. Such facts in connection with the matter and the reasons for the desired relief as may be relied upon by the applicant as justifying such relief.

2. Such schedules or data, if any, as the Commission's applicable orders or instructions may from time to time specify.

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RULE 31.

Application under Article II, §1-(d), of The Public Service Company Law for Restriction of the Number and Character of Tariffs and Schedules, and number of Offices or Stations at which such Tariffs and Schedules are required to be Posted.

When application is made to the Commission for permission to limit and restrict the number and character of tariffs and schedules and the number of offices or stations at which the same are required to be posted, under Article II, §1-(d) of The Public Service Company Law, the petition shall, in addition to the requirements of Rule 23, contain and embrace as part thereof :

A statement in detail of the reasons which, in the view of the applicant, warrant the granting by the Commission of the relief applied for, and such other facts, data, and information in connection with the matter, as may be specified from time to time in the Commission's orders or instructions.

Rule 32.

Application for Permission to make Changes in Tariffs or Schedules, upon less than Thirty Days' Notice, under Article II, §1-(f), of The Public Service Company Law.

When application is made by a public service company under Article II, §1-(f) of The Public Service Company Law, for allowance of changes in tariffs or schedules upon less than thirty days' notice to the Commission and to the public, posted and published in the manner, form, and places required, with respect to the original tariffs, or schedules, the petition shall, in addition to the requirements of Rule 23, contain and embrace as part hereof :

A detailed statement of all the facts, circumstances, and conditions relied upon by the petitioner to warrant the granting by the Commission of the allowance applied for.

RULE 33.

Applications for Certificate of Public Convenience for the Construction, Alteration, Relocation, or Abolition of any Crossing at Grade, or Above, or Below Grade, under Article III, §5, Article V, §§ 12, 18, and 19, of The Public Service Company Law.

When application is made for a Certificate of Public Con-

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venience, under the provisions of Article III, § 5, and Article V, §§ 12, 18, and 19 of The Public Service Company Law, for the construction, alteration, relocation, or abolition of any crossing at grade, or above, or below, grade.

1. Of public roads, highways, or streets by railroads or street railways; or

2. Of railroads or street railways by public roads, highways or streets; or

3. Of railroads or street railways by railroads or street railways; or

4. Of the facilities of one public service company by those of another—the petition shall, in addition to the requirements of Rule 23, contain and embrace as part thereof:

1. If the application be for a Certificate of Public Convenience for the construction, alteration, or relocation of such a crossing, map on scale of not less than 200 feet per inch, showing correctly the location of all tracks, buildings, structures, property lines, streets and roads in the vicinity of the proposed construction, alteration or relocation, or which may be, in any manner, affected thereby, and also complete plans and specifications of such proposed construction, alteration, or relocation.

2. Profiles showing ground lines and proposed grade lines of approaches on such public roads, highways or streets, railroads or street railways, as may be affected by the proposed construction, alteration, or relocation.

In case of a contemplated crossing of a railroad by a railroad, the profile of such railroads shall show the customary information for not less than one mile on each side of the proposed crossing.

3. If the application be for the construction of a crossing at grade, such facts, data, and estimates of cost, or other facts and data relied upon by the applicant to necessitate or warrant the granting of permission to construct such crossing at grade, together with a detailed and accurate description of such safety devices, safeguards and other protective means, if any, as the applicant may believe should be installed, with detailed information concerning the same, and if the application be made by a public service company the application shall set forth also, a specification of the proposed method of operating such crossing at grade, if permission to construct the same be granted.

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With the petition to construct a crossing at grade shall be filed the maps and profiles, plans and specifications, above specified in this rule, and all other data and information which may be specified from time to time in the Commissioner's general orders or instructions, or which may be required in connection with any particular application.

4. If the application be for the abolition of such a crossing at grade, the petition, in addition to the above stated requirements, shall contain and embrace as part thereof:

An estimate of the cost and expense, including compensation to the owners of adjacent property affected, together with all facts, data and information upon which such estimate is based.

5. A statement of the facts relied upon by the petitioner to show that the construction, alteration, relocation, or abolition of any such crossing is practicable and necessary or proper for the service, accommodation, safety, or convenience of the public, shall be set forth in every petition.

RULE 34.**Petitions for Reparation Under Article V, § 5, of The Public Service Company Law.**

Application by any shipper, consumer, user or patron, for an order for reparation as against any public service company, under Article V, §5, of The Public Service Company Law, shall be by petition, which, in addition to the requirements of Rule 23, shall contain and embrace as part thereof:

Such facts in connection with the matter as may give the necessary information or as may be prescribed from time to time in the Commission's orders or instructions.

RULE 35.**Applications for Certificate of Valuation in Connection with the Proposed Issue of Stocks, Trust Certificates, Bonds, Notes, or Other Evidences of Indebtedness, or other Securities, under Article III, §4-(a), of The Public Service Company Law.**

When application is made for a Certificate of Valuation, in connection with the proposed issue of any stocks, trust certificates, bonds, notes, or other evidences of indebtedness, or other securities, under Article III, §4, (a) of The Public Service

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Company Law, the petition shall, in addition to the requirements of Rule 23 contain and embrace as part thereof :

The statement of facts, data, and information required by Article III, §4-(b) of the Public Service Company Law, to be shown in certificates of Notification. Such petition shall contain such additional facts, data and information as the Commission shall, from time to time, determine and prescribe, and shall be signed and verified by the affidavit of the treasurer, auditor, controller, or other acting fiscal head of the petitioning public service company.

RULE 36.

Petitions or Applications for the Approval of Contracts between Municipal Corporations and Public Service Companies, or for a Declaration by the Commission of the Terms and Conditions upon which it will grant its approval of such Contracts, if at all, under Article III, §11, and Article V, §§ 18, and 19, of The Public Service Company Law—and Hearings Thereon.

1. Applications for the approval of contracts between municipal corporations and public service companies, under Article III, §11, and Article V, §§ 18 and 19 of The Public Service Company Law, shall be by petition for a Certificate of Public Convenience, which petition, in addition to the requirements of Rule 23, shall set forth the facts relied upon by the petitioner to show that the granting of such Certificate of Public Convenience is necessary or proper for the service, accommodation, convenience, or safety of the public.

Said petition shall be accompanied :

(a) By the original contract, the approval of which is applied for, executed by the parties thereto.

(b) By a true and correct copy of such original contract, certified by the parties thereto.

(c) Ten additional true and correct copies of such contract.

2. Applications, before the consent of the local authorities has been obtained, for a declaration by the Commission of the terms and conditions upon which it will grant its approval of a contract between a municipal corporation and a public service company, if at all, under Article III, §11, of The Public Service Company Law, shall be by petition, which, in addition to the requirements of Rule 23, shall set forth the facts relied upon by the petitioner to show that the granting of a

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Certificate of Public Convenience, upon an application therefor, is necessary or proper for the service, accommodation, convenience or safety of the public.

Said petition shall be accompanied by ten true and correct copies of the proposed ordinance which the applicant proposes to accept as evidencing the proposed contract between such applicant and a municipal corporation, or shall be accompanied by the contract proposed by the applicant and also by the municipal corporation, to be made by and between them, however evidenced, and containing all the terms, stipulations and conditions thereof, and shall be further accompanied by a copy of the notice of such application required by Article III, §11, of The Public Service Company Law to be given to the local authorities concerned, with proof of service of such notice. Such notice shall specify the date upon which such application to the Commission is to be made by the public service company.

3. All such contracts submitted to the Commission for approval shall contain the following provision:

"It is hereby understood and agreed that neither the purpose nor intent, nor the obligation of this contract, if and when approved by the Public Service Commission of the Commonwealth of Pennsylvania, is such as, to impair or in any wise affect the exercise by said Commission of any of the powers vested in it by the Public Service Company Law, approved July 26, 1913."

4. Upon the filing of the petition for the approval of the contracts between municipal corporations and public service companies, or upon petition for a declaration by the Commission of the terms and conditions upon which it will grant its approval of such contracts, if at all, under Article III, §11, of The Public Service Company Law, and under this rule, the Commission will fix a time and place of hearing, which shall be public, and of which due notice, in the form prescribed below, shall be given by the applicant, by publication, once a week, for two weeks, the last of which publication shall be at least five days preceding the date of hearing, in a newspaper of general circulation, published in the municipality in which the contract is to be effective, and, in the event that no such newspaper is published in that municipality, then in such

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newspaper published at the county seat of the county in which the municipality is situate.

FORM OF NOTICE TO BE PUBLISHED.

Notice is hereby given that application will be made to the Public Service Commission of the Commonwealth of Pennsylvania for the approval of a contract
 between
 and
 for

 the hearing on which will be held in the rooms of the Commission at Harrisburg, on the day of
 at when and where all persons in interest may appear and be heard if they so desire.

RULE 37.**Other Applications.**

All applications relating to matters over which the Commission has jurisdiction, and which are not governed by any of the preceding rules, shall be made by petition and shall conform to the requirements of Rule 23, and such other rules and regulations as the Commission may, from time to time, prescribe.

RULE 38.**Practice and Procedure on Petitions—General.**

Upon the filing of any petition required by these rules, the Commission will examine the same to see whether it establishes a prima facie case for action on the part of the Commission, and conforms to the provisions of The Public Service Company Law and these rules. If the petition fails in any of these respects, the Commission will give notice of the defects to the applicant, who may correct the same.

If the petition be found to establish a prima facie case for action and to comply with the provisions of The Public Service Company Law and with these rules, the Commission may appoint a time and place for a hearing on the same, as may be required by law.

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The Commission will, by general rule or order, or by special rule or order, in each case, direct what notice of the hearings shall be given by publication, or otherwise.

All hearings shall be public and at or before the hearing the applicant, or petitioner, shall present due proof of the publication or service of the notice thereof, in the manner prescribed by the Commission. At the hearing the applicant, or petitioner, must be prepared to establish all the facts alleged in the petition by evidence, but the Commission may, in its discretion, where authorized by law, in any case so to do, grant the application upon the petition and accompanying papers.

The applicant must furnish for the use of the Commission, in reaching a determination upon any application, the originals, or certified or verified copies, of all books, papers and documents, as the Commission may require. The failure so to do shall be ground for refusing the application.

RULE 39.**Compliance with Orders.**

Upon the issuance by the Commission of an order against any public service company or companies, such public service company or companies must promptly, upon compliance with its requirements, notify the Secretary that action has been taken, in conformity with the order, and when a change in rates is ordered by the Commission, such notice must be given in addition to the filing and posting of a tariff or schedule, or supplement thereto, showing change in rates.

RULES AND REGULATIONS GOVERNING FORM OF TARIFFS AND SCHEDULES.

FORM AND SIZE.

1. All tariffs and schedules must be printed on hard calendered paper of good quality from type of size not less than 6 point full face, in book, sheet or pamphlet form and of size 8 by 11 inches. Loose-leaf plan may be used so that changes can be made by re-printing and inserting a single leaf.

No alterations in writing or erasures must be made.

TITLE PAGE.

2. The title page shall show:

(a) Name of issuing Public Service Company and address.

(b) Number of tariff, starting with number one, and the prefix P. S. C. Pa. used. The number and prefix must be in bold type on upper right hand corner, and immediately thereunder, in smaller type, the number or numbers of tariffs cancelled thereby. Serial numbers of the Public Service Companies may, if desired, be entered below the upper marginal line of the title-page. Separate serial P. S. C. Pa. numbers will be used for the different classes of tariffs and schedules.

(c) The locality at which tariff or schedule applies. If between various points, the territory will be briefly stated.

(d) Reference by name and P. S. C. Pa. number to any other tariff or schedule which may apply in connection with the tariff or schedule.

(e) Date of issue and date effective.

(f) On every tariff schedule that is issued on less than thirty days' notice with approval or by order of the Commission, notation that it is issued under Special Permission or Order of The Public Service Commission of the Commonwealth of Pennsylvania, No.....of (date).

(g) Name, title and address of officer by whom tariff or schedule is issued.

TARIFFS AND SCHEDULES SHALL CONTAIN.

3. Tariffs and schedules shall contain:

(a) Table of Contents: A full and complete statement in alphabetical order, of the exact location where information, by subjects, will be found, specifying page and item numbers. This table of contents may be omitted where the volume of

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matter is so small that its title page or its interior arrangement plainly discloses its contents.

(b) If a joint tariff or schedule, the names of Public Service Companies participating, alphabetically arranged. But if the number of participating companies is not more than ten their names may be shown on the title page of the tariff or schedule. The form and number of concurrence of participating companies must be shown.

(c) Explanation of reference marks and technical abbreviations used.

(d) An explanatory statement in clear and explicit terms regarding the rates, tolls, charges, etc., contained in the tariff or schedule may be necessary to remove all doubt as to their proper application.

(e) Rules and regulations which govern the tariff or schedule, or in any manner affect the rates named therein.

(f) Rates, charges, tolls, etc., shall be stated in cents, or in dollars and cents, per unit.

(g) Alphabetically arranged and complete index of all commodities upon which commodity rates are named, also index of points from which and to which rates apply.

4. All tariffs or schedules must indicate increases thereby made in existing rates, charges, tolls, rules, regulations, or classifications by the use of black faced type.

5. In case of railroad or other common carriers, telegraph and telephone corporations, such tariffs and schedules shall conform to those required by the Interstate Commerce Commission.

6. Tariffs or Schedules of all Common Carriers shall, as required by (Art. 2, Sec. 1-d) of The Public Service Company Law, show the method of distribution of trains, cars, vehicles, boats, motive power, or other facilities operated or owned by such common carrier, and all rules and regulations that in any manner affect such distribution.

7. In case of change of ownership or control of a Public Service Company, the company absorbed, taken over or purchased shall unite with other company in common supplements to existing tariffs or schedules, one withdrawing and the other accepting and establishing said existing and effective tariffs and schedules. The common supplements to be executed jointly by the officers of both old and new Public Service Companies and numbered as supplements (even if the tariff or schedule is less than three pages). New tariffs or sched-

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ules shall be numbered in series as of the new Public Service Company. Similar notice must be made by a receiver or receivers.

AMENDMENTS AND SUPPLEMENTS.

8. A change in or addition to a tariff or schedule shall be known as an amendment, and shall be shown in a supplement to same and shall refer to the page or pages or item or items of the previous tariff or schedule or supplement thereof which it amends. A tariff or schedule of less than three pages may not be supplemented or amended but must be reissued, of three or more pages may be supplemented to the extent of not more than fifty per centum of the number of pages in the tariff or schedule.

RULES PERTAINING TO ELECTRIC SERVICE UTILITIES. PREPARED BY PROF. L. H. HARRIS, UNIVERSITY OF PITTSBURGH, AND PROF. R. H. FERNALD, UNIVERSITY OF PENNSYLVANIA. ADOPTED APRIL 9, 1914.

NOTE.—Nothing contained in these rules shall be construed as relieving any utility from the performance of any of its legal duties to the public.

By order of THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF PENNSYLVANIA.

PART I.

GENERAL.*Definition:*

The term "utility" as used in these rules includes all public service companies, corporations and persons, as defined in The Public Service Company Law, engaged in the production, sale or distribution of electricity within the jurisdiction of the Commission.

I. Statutory:

"It shall be the duty of every public service company to furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically

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sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the Commission."

II. Voltage Variation:

Each utility supplying electrical energy from a constant voltage system, shall adopt standard service voltages for such system, the suitability and adequacy of which voltages may be determined at any time by the Commission, and every reasonable effort shall be made to maintain such voltage practically constant at all times during which service is supplied. For service rendered under a lighting contract, or primarily for lighting purposes, the variations of voltage as measured at the service terminals shall not exceed five (5%) per cent., plus or minus, of the standard service voltage for that locality, for a longer period than one minute at each instance, at any time during which service is supplied. For service rendered under a power contract, or primarily for power purposes, voltage variations as measured at the service terminals shall not exceed ten (10%) per cent., plus or minus, of the standard service voltage for that locality for a longer period than one minute at each instance: Provided, First, That this limit of ten (10%) per cent., shall not apply to power supplied from direct current trolley wires; and, Second, That a utility may, if satisfactory to and approved by the Commission, furnish service under conditions of greater voltage variations, (a) upon filing with the Commission a copy of all existing contracts containing a provision for service with such greater variations of voltage, or, (b) upon filing with the Commission a copy of all existing contracts which do not contain a provision for such greater variations in voltage, together with a statement in each case of the variations in voltage existing in the service rendered under each said contract, and (c) upon filing with the Commission a copy of all contracts made hereafter which contemplate service under conditions of greater voltage variations, and which shall in each case henceforth contain a clause stating the probable variations in voltage that will occur in the service rendered under said contract: And provided, further, that such greater variations in the voltage shall not result in unreasonable discrimination in favor of or against any consumer. Variations of voltage in excess of those specified above, caused by the operations of the consumer in violation of his contract or

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the rules of the utility, or from causes beyond the control of the utility, shall not be considered a violation of this rule.

III. Records of Station Voltage:

Each utility shall keep in continuous operation at least one graphic recording voltmeter in each generating station. Each utility shall also place and connect additional graphic recording voltmeters at such places and for such periods of time as the Commission may from time to time require. All records from such meters shall be kept on file as specified in Rule X.

IV. Standard Frequency:

Each utility supplying alternating current shall adopt a standard frequency, the suitability of which may be determined by the Commission, and shall maintain this frequency within five (5%) per cent., plus or minus, of standard, at all times during which service is supplied: Provided, That momentary variations of frequency of more than five (5%) per cent. which are clearly due to no lack of proper equipment or reasonable care on the part of the utility, shall not be considered a violation of this rule.

V. Records of Load and Interruptions:

Each utility shall keep a record of the time of starting and disconnecting all street lighting circuits; of the readings of such instruments at each generating station, and at such intervals as are necessary to determine the characteristics of the load; and of all interruptions to service affecting the busbars, feeders, or distributing mains, which record shall show the time, duration, extent, and the cause when known, of the interruption. An interruption is here defined for the purpose of record only, as the interval of the time during which the voltage falls below fifty (50%) per cent. of standard voltage. All such records shall be kept as specified in Rule X, for at least two years.

VI. Complaint Records:

Each utility shall keep a record of all written complaints received from its consumers in regard to service, which record shall show the name and address of the complainant, the date and nature of the complaint, the action taken, and the date of final disposition of the matter. These records shall be kept as specified in Rule X.

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VII. Maintenance and Inspection:

Each utility shall maintain its equipment and facilities, and shall make periodic inspection of the same, all in accordance with good practice, and in a manner satisfactory to the Commission. Each utility shall also keep a complete record of all such inspections, as specified in Rule X, and shall file with the Commission a statement of the condition of its equipment and facilities, and such copies of its reports of inspections, when and in such form as the Commission may require.

VIII. Defective Apparatus:

Whenever any equipment or facilities, the failure of which would involve life hazard, are removed from service for any reason, they must be thoroughly inspected and tested before being again placed in service, and no equipment or facilities shall be placed in service or continued in service, which have for any reason become dangerous, or are liable to cause injury to persons or damage to property.

IX. Accidents:

Each utility shall keep a record of and shall furnish to the Investigator of Accidents for the Commission, in accordance with the rules of the Commission, reports of any and all accidents happening in or about or in connection with the operation of its property, facilities or service, wherein any person shall have been killed or injured, or property damaged or destroyed, with a full statement as far as possible of the causes of such accidents, and the precautions, if any, taken as prevention against future accidents of similar character.

X. Records and Reports:

All records required by these rules shall be kept with in the state, at an office or offices of the utility located in the territory served by it, and shall be open for examination by the Commission or its representative. Each utility shall notify the Commission of the office or offices at which the various classes of records are kept, and shall file with the Commission such reports as the Commission may from time to time require.

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PART II.

METERS.

XI. Allowable Error:

No watt-hour meter shall be placed in service nor allowed to remain in service, which registers at no load when the applied voltage is less than one hundred and ten (110%) per cent. of standard service voltage, nor which is in any way mechanically defective, nor which has incorrect constants, nor an error in measurement in excess of four (4%) per cent.

XII. Method of Determining the Error:

The error of a service watt-hour meter shall be determined as follows: The error at light load—here defined as not less than five (5%) per cent. nor more than ten (10%) per cent. of rated capacity for induction type meters, and not less than ten (10%) per cent. nor more than fifteen (15%) per cent. of rated capacity for commutator type and mercury type meters—shall be determined by taking the average of at least two errors, determined from as many separate readings of the same light load, which errors must agree with each other within one-half ($\frac{1}{2}\%$) per cent. of registration accuracy. In the same manner the error at heavy load—here defined as not less than seventy-five (75%) per cent. nor more than one hundred (100%) per cent. of rated capacity—shall be determined.

The error of the meter shall then be determined by taking the average of the error at light load and the error at heavy load, proper account being taken of the sign of these two errors: Provided, That where, the consumer's connected load does not equal seventy-five (75%) per cent. of the rated capacity of the meter, the full connected load may be considered as heavy load for purposes of test.

In all cases where it is not practicable to determine the error by the method outlined above, the utility shall have the option of installing an approved check meter or meters, and determining the error of the service meter by comparing the watt-hours registered by the check meter with the watt-hours registered by the service meter in the same time. When this option is exercised, the check meter shall be left in circuit until the hand on the first dial of the service meter shall have made at least two complete revolutions. If a utility desires to use "per cent. registration" or "accuracy," in place of "per cent. error," the

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per cent. registration shall be determined in the same manner as provided above for determining per cent. error.

XIII. Meter Record:

Each utility shall maintain a record of all its service watt-hour meters, which record shall show the name of the manufacturer, the type, the rating, the date of purchase when purchased after July 1, 1914, the date and location of all installations in service and the removals therefrom, the date of all tests and the reasons therefor, and the error "as found" and "as left." This record shall be kept as specified in Rule X, and shall be complete and up to date within three years subsequent to July 1, 1914.

XIV. Test Previous to Installation:

Each watt-hour meter installed after July 1, 1914, shall have been tested for accuracy by the utility within ninety (90) days previous to its installation, or shall be so tested within sixty (60) days thereafter. It shall also be inspected by the utility for proper connection, mechanical condition, and suitability of location within sixty (60) days after the installation.

XV. Facilities for Testing:

Each utility shall provide for and have available, suitable and adequate facilities for testing its watt-hour meters, in each case to be satisfactory to and approved by the Commission. These facilities shall, in general, include a test bench free from unnecessary encumbrances, one or more portable rotating standard watt-hour meters, a suitable check meter or meters mounted on the test bench, and such other necessary equipment as the Commission may require. The check meter shall be the reference standard for the utility, and shall be periodically tested for accuracy, and adjusted when necessary by a representative of the Commission, and at such place as the Commission may direct. Immediately after making final adjustment, the tester shall seal and date tag the meter, and shall furnish the utility with a correction curve properly dated and signed.

The portable rotating standard shall also be tested and adjusted periodically by a representative of the Commission, and at such place as the Commission may direct. The tester shall furnish the utility with a correction curve properly dated and signed. During the interval between tests by the Commission,

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the portable standard shall be compared with the check meter at least once each week for commutating types, and at least once every two weeks for induction types, during the time the portable meter is in service, and the calibration thus obtained shall be used in determining the error of the service meters. A complete record of these check-tests shall be kept for at least two years, as specified in Rule X. This record shall show the condition and accuracy of the rotating standard "as found" and "as left;" all in such form and such detail as to permit of convenient checking of the method and results.

All correction curves furnished by the Commission shall be kept with the meter until superseded. After January 1, 1915, tests made with uncertified facilities will not be deemed authoritative.

XVI. Frequency of Periodic Tests:

Each utility shall make periodic tests of all its watt-hour meters in service, in accordance with the following schedule:

- (a) Two and three wire commutating type and mercury type meters, up to and including fifty (50) amperes rated capacity of meter element, shall be tested at least once every eighteen (18) months.
- (b) Two and three wire commutating type and mercury type meters of over fifty (50) amperes rated capacity of meter element, shall be tested at least once every twelve (12) months.
- (c) Two and three wire single phase induction type meters, up to and including twenty-five (25) amperes rated capacity of meter element, and manufactured prior to January 1, 1907, shall be tested at least once every thirty (30) months. Meters of the same type and rating manufactured since January 1, 1907, shall be tested at least once every thirty-six (36) months.
- (d) Two and three wire single phase induction type meters of over twenty-five (25) amperes rated capacity of meter element, shall be tested at least once every twenty-four (24) months.
- (e) Self contained polyphase meters up to and including fifty (50) k. w. rated capacity, shall be tested at least once every eighteen (18) months.

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- (f) Self contained polyphase meters of over fifty (50) k. w. rated capacity, shall be tested at least once every twelve (12) months.
- (g) Polyphase meters connected through current transformers, or current and potential transformers, to circuits up to and including fifty (50) k. w. rated capacity, shall be tested at least once every twenty-four (24) months.
- (h) Polyphase meters connected through current transformers, or current and potential transformers, to circuits of over fifty (50) k. w. rated capacity, shall be tested at least once every eighteen (18) months.

Whenever the number of meters of any type which register in error beyond the limits specified in Rule XI, is deemed by the Commission to be excessive, then this type shall be tested with such additional frequency as the Commission may direct.

XVII. Meters in Service Without Test Records:

All watt-hour meters in service on and after July 1, 1914, for which there is no record of test within the time equal to the period of test for that class and rating of meter as specified in Rule XVI, shall be tested as soon thereafter as circumstances will permit. In no case shall the time subsequent to July 1, 1914, exceed the length of the period of test for meters of that class and rating as specified in Rule XVI.

XVIII. Request Tests:

Each utility shall upon the written request of a consumer, and if he so desires, in his presence or that of his authorized representative, make a test of the accuracy of his meter. When a consumer desires, either personally or by a representative, to witness the testing of a meter, he may require the seal of the meter to be broken only in his presence or that of his representative. If the meter so tested shall be found to be accurate within the limits specified in Rule XI, a fee determined from the schedule indicated below, shall be paid to the utility by the consumer requiring such test; but if not so found, then the cost thereof shall be born by the utility furnishing the service. When making such request, the consumer shall agree to the basis of payment herein specified. A report of such test shall be made to the consumer, and a complete record of such test shall be kept on file as specified in Rule X.

The Public Service Commission.

Schedule of Fees For Testing Watt-Hour Meters.

- (a) For direct current and single phase meters operating on 600 volts or less, up to and including twenty-five (25) amperes rated capacity of the meter element, ... \$1 50.
- (b) For each additional fifty (50) amperes or fraction thereof, ... 50
- (c) For single phase meters above 600 volts, and for polyphase meters with or without instrument transformers, up to and including twenty-five (25) k. w. rated capacity of the circuit, ... 2 50
- (d) For each additional twenty-five (25) k. w. rated capacity, or fraction thereof, ... 2 50

Rates for meters not included in the above classification, or so located that the cost is out of proportion to the fee specified, will be furnished by the Commission upon receipt of complete specifications.

XIX. Power Factor Adjustment:

All alternating current watt-hour meters which are provided with a power factor compensation, should be tested and adjusted for correct registration within two (2%) per cent., plus or minus, at one hundred (100%) per cent. power factor, and within four (4%) per cent. at zero or fifty (50%) per cent. power factor (lagging) before installation. All alternating current watt-hour meters in service which have not been so tested and adjusted before installation, and which are connected to circuits supplying other than non-inductive load, shall be tested for accuracy at one hundred (100%) per cent. power factor, and at zero or fifty (50%) per cent. lagging power factor. In all cases where it is not practicable to determine the error of the meter at these power factors, the utility shall have the option of installing an approved check meter, and determining the error as provided in the last paragraph of Rule XII.

XX. Place of Making Tests:

All tests provided for in Rules XIV, XVI and XVIII, and except those made previous to installation as provided for in

The Public Service Commission.

Rule XIV, shall be made in the place of permanent location on the consumer's premises, with approved equipment and under local conditions.

XXI. Watt-Hour Meter Tests Without Accessories:

In all cases where a service watt-hour meter is connected to the line through shunts, multipliers, or instrument transformers, the test may be made on the meter as a self contained unit, and the ratio of the accessories used to determine the error of the meter, provided that the certificates of the accessories bear a date within five years, and are satisfactory to the Commission.

XXII. Adjustment After Test:

All service watt-hour meters shall be so adjusted after test that the error of the meter as defined in Rule XII shall not exceed two (2%) per cent. Neither shall the error at light load exceed four (4%) per cent., nor the error at heavy load exceed two (2%) per cent.

XXIII. Change of Frequency:

If a utility shall change its standard of frequency, it shall give reasonable notice to all its consumers, and shall make tests and shall readjust all watt-hour meters as soon thereafter as practicable, and shall refund to the consumer all the excess charges which have been collected from him by reason of the change of frequency.

XXIV. Refund for Overcharge:

If a meter be found to be fast by more than four (4%) per cent. as defined in Rule XII at any test, an allowance or refund shall be made to the consumer by the utility, equal to all the excess charged the consumer, figured back from the date of test through the entire period of the current bill, unless it can be shown that the error is due to an accident of other cause, the exact time of which is known, in which case it shall be figured back to such time.

The Public Service Commission.

RULES PERTAINING TO GAS SERVICE UTILITIES. PREPARED BY
PROF. L. H. HARRIS, UNIVERSITY OF PITTSBURGH, AND
PROF. R. H. FERNALD, UNIVERSITY OF PENNSYLVANIA.
ADOPTED APRIL 9, 1914.

NOTE.—Nothing contained in these rules shall be construed as relieving any utility from the performance of any of its legal duties to the public.

By order of THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF PENNSYLVANIA.

PART I.

GENERAL.

Definition:

The term "utility" as used in these rules includes all public service companies, corporations and persons, as defined in The Public Service Company Law, engaged in the production, sale or distribution of gas within the jurisdiction of the Commission.

I. Statutory:

"It shall be the duty of every public service company to furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the Commission."

II. Pressure Variation:

Each utility furnishing manufactured gas shall maintain at the consumer's meter outlet a gas pressure of not less than one and one-half inches nor more than eight inches of water pressure; and within said limits the daily variation of pressure at the outlet of any one meter on the system shall never be greater than one hundred (100%) per cent. of the minimum pressure. Each utility furnishing natural gas shall maintain at the consumer's meter outlet a gas pressure of not less than one and one-half inches, nor more than fourteen inches of water pressure, except when greater pressure is specifically provided in the contract between the utility and the consumer, provided there shall be no unfair and unreasonable discrimina-

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tion or preference; and within the said limits the daily variation of pressure at the outlet of any one meter on the system shall never exceed four inches of water pressure above or below the normal pressure maintained at such point of delivery, unless it can be shown to the Commission that such greater variation is due to extraordinary demand in extreme weather.

Provided, that variations in pressure caused by operation of consumer's apparatus in violation of contract or the rules of the utility, or by causes entirely beyond the control of the utility, shall not be considered a violation of this rule.

III. Required Heating Value:

Each utility furnishing manufactured gas service must supply gas which when tested within a one mile radius from the point of manufacture, shall give a monthly average of not less than 570 British thermal units total heating value per cubic foot, as referred to standard condition of temperature and pressure, except gas which in the opinion of the Commission, is produced as a by-product in the manufacture of coke, which gas shall give a monthly average of not less than 550 British thermal units per cubic foot. The minimum heating value of manufactured gas shall never fall below 520 British thermal units except for by-product coke oven gas as indicated above, which shall never fall below 500 British thermal units. Manufactured gas delivered to the mains under pressures above 5 pounds per square inch shall be tested for heating value before compression. The minimum heating value of natural gas supplied by any utility shall never fall below 800 British thermal units per cubic foot, as referred to standard condition of temperature and pressure.

IV. Sulphur Requirements:

In no case shall manufactured gas contain more than 30 grains of total sulphur per 100 cubic feet.

V. Service Interruptions:

Each utility shall keep a record of all interruptions to service on the entire system or any portion thereof belonging to the utility, which record shall contain the time, cause, extent and duration of the interruption, and shall be kept as specified in Rule IX.

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VI. Complaint Records:

Each utility shall keep a record of all written complaints received from its consumers in regard to service, which record shall show the name and address of the complainant, the date and nature of the complaint, the action taken, and the date of final disposition of the matter. These records shall be kept as specified in Rule IX.

VII. Inspection of Equipment:

Each utility shall inspect its equipment and facilities, including the necessary tests for water and leaks in its lines, in accordance with good practice, and in a manner satisfactory to the Commission, and shall maintain as specified in Rule IX, a complete record of all such inspections and tests, and shall file with the Commission a statement of the condition of its equipment and facilities, and such copies of its reports of inspections, when and in such form as the Commission may require.

VIII. Accidents:

Each utility shall keep a record of and shall furnish to the Investigator of Accidents for the Commission, in accordance with the rules of the Commission, reports of any and all accidents happening in or about or in connection with the operation of its property, facilities or service, wherein any person shall have been killed or injured, or property damaged or destroyed, with a full statement as far as possible of the causes of such accidents, and the precautions, if any, taken as prevention against future accidents of similar character.

IX. Records and Reports:

All records required by these rules shall be kept within the state, at an office or offices of the utility located in the territory served by it, and shall be open for examination by the Commission or its representative. Each utility shall notify the Commission of the office or offices at which the various classes of records are kept, and shall file with the Commission such reports as the Commission may from time to time require.

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PART II.

METERS, CALORIMETERS, ETC.

X. Allowable Error:

No gas meter shall be placed in service nor allowed to remain in service, which shows in comparison with a standard gas prover, an error greater than two (2%) per cent. when gas at the standard test rate of flow is passing through it.

XI. Periodic Tests:

No utility furnishing metered gas service shall allow a gas meter to remain in service for a period longer than five years without checking it for accuracy, or readjusting it if found to be incorrect beyond the limits established by Rule X. Proportional meters shall be tested once every five years and re-adjusted if necessary, and cleaned by a competent man at least once each three months.

XII. Meter Test Records:

Whenever a gas service meter is tested the original test record shall be kept, indicating the information necessary for identifying the meter, the reason for making the test, the reading of the meter before being disturbed, and the accuracy of the meter, together with all the data taken at the time of the test. This record must be sufficiently complete to permit the convenient checking of the methods employed, and the calculations made. A record shall also be kept, preferably numerically arranged, indicating date of meter purchase, when purchased after July 1, 1914, name of manufacturer, its size, its identification, its various places of installation, with dates of installation and removal, and dates and general results of all tests. These records shall be kept as specified in Rule IX.

XIII. Installation of Meters:

Each gas service meter installed after July 1, 1914, shall have been tested for accuracy by the utility within one year previous to its installation. It shall also be inspected by the utility for proper connections, mechanical conditions, and suitability of location within sixty (60) days after installation.

XIV. Facilities for Testing:

Each utility shall provide and maintain suitable and adequate

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facilities for testing its gas service meters, in each case to be satisfactory to and approved by the Commission. Each utility shall provide a suitable meter prover, of not less than five (5) cubic feet capacity, equipped with suitable thermometers and other necessary accessories, and shall maintain the same in proper adjustment to register the condition of the meters within one-half of one per cent. The accuracy of all provers will be established from time to time by a representative of the Commission at a place to be designated by it. After January 1, 1915, tests made with an uncertified prover will not be deemed authoritative.

XV. Pressure Surveys:

Each utility shall provide itself with one or more graphic recording pressure gauges, and shall make frequent measurements of the gas pressure and pressure variation throughout its system. Charts from these gauges showing the pressure variations shall be kept for at least two years as specified in Rule IX. The accuracy of all pressure gauges will be established from time to time by a representative of the Commission at a place to be designated by it. After January 1, 1915, tests made with an uncertified pressure gauge will not be deemed authoritative.

XVI. Calorimeter Tests:

Each utility whose gas output exceeds twenty million cubic feet per year shall equip itself with a complete standard calorimeter outfit approved by the Commission, by which it shall determine the heat value of manufactured gas at least three days each week, and of natural gas at least three times per year. A complete record of all these tests shall be kept as specified in Rule IX. The accuracy of all calorimeters will be established from time to time by a representative of the Commission at a place to be designated by it. After January 1, 1915, tests made with an uncertified calorimeter will not be deemed authoritative.

XVII. Meters in Service without Test Records:

All gas meters in service on and after July 1, 1914, for which there is no record of test within five years, must be tested as soon thereafter as circumstances will permit, and in all cases within three years from July 1, 1914.

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XVIII. Request Tests:

Each utility shall upon the written request of a consumer, and if he so desires, in his presence or that of his authorized representative, make a test of the accuracy of his meter. When a consumer desires, either personally or through a representative, to witness the testing of a meter, he may require the meter to be sealed in his presence before removal, which seal shall not be broken until the test is made in his presence. If the meter so tested shall be found to be accurate within the limits specified in Rule X, a fee determined from the schedule indicated below, shall be paid to the utility by the consumer requiring such test; but if not so found, then the cost thereof shall be borne by the utility furnishing the service. When making such request, the consumer shall agree to the basis of payment herein specified. A report of such test shall be made to the consumer, and a complete record of such test shall be kept on file as specified in Rule IX.

The amount of the fee to be charged by the utility for testing meters upon written complaint of consumers, shall be determined by the manufacturers' designated rating, as follows:

Positive Meters.

Meters of 10-Lt. capacity or under, or having a rated capacity of 200 cubic feet per hour or under, ...	\$2 00
Meters of over 10-Lt. capacity and not exceeding 30-Lt. capacity, or having a rated capacity exceeding 200 cubic feet per hour, and not exceeding 600 cubic feet per hour, ...	4 00
Meters of over 30-Lt. capacity and not exceeding 80-Lt. capacity, or having a rated capacity exceeding 600 cubic feet per hour, and not exceeding 1,500 cubic feet per hour, ...	6 00
Meters of over 80-Lt. capacity, or having a rated capacity exceeding 1,500 cubic feet per hour, ...	10 00

Proportional Meters.

All Proportional Meters not exceeding 15,000 cubic feet per hour rated capacity, ...	15 00
All Proportional Meters of over 15,000 cubic feet and not exceeding 30,000 cubic feet per hour, ...	20 00
All Proportional Meters of over 30,000 cubic feet and not exceeding 50,000 cubic feet per hour rated capacity, ...	30 00

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All Proportional Meters of over 50,000 cubic feet and not exceeding 100,000 cubic feet per hour rated capacity, ...	40 00
All Proportional Meters of over 100,000 cubic feet per hour rated capacity, ...	50 00
Rates for testing meters not included in the above classification, or which are so located that the cost is out of proportion to the fee specified, will be furnished by the Commission upon receipt of complete specifications.	

XIX. Refunds:

If a meter be found to be fast at any test by more than two (2%) per cent., an allowance or refund shall be made to the consumer by the utility, equal to all the excess charged the consumer, figured back from the date of test through the entire period of the current bill, unless it can be shown that the error is due to an accident or other cause the exact date of which can be determined, in which case it shall be figured back to such time.

RULES PERTAINING TO HEATING SERVICE UTILITIES. PREPARED BY PROF. L. H. HARRIS, UNIVERSITY OF PITTSBURGH, AND PROF. R. H. FERNALD, UNIVERSITY OF PENNSYLVANIA. ADOPTED APRIL 9, 1914.

NOTE.—Nothing contained in these rules shall be construed as relieving any utility from the performance of any of its legal duties to the public.

By order of THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF PENNSYLVANIA.

PART I.

GENERAL.

Definition:

The term "utility" as used in these rules includes all public service companies, corporations and persons, as defined in The Public Service Company Law, engaged in the production, sale or distribution of heat within the jurisdiction of the Commission.

*The Public Service Commission.**I. Statutory:*

"It shall be the duty of every public service company to furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the Commission."

II. Service Interruptions:

Each utility shall keep a record of all interruptions to service on the entire system or any portion thereof, belonging to the utility, which record shall contain the time, cause, extent and duration of the interruption, and shall be kept as specified as Rule VI.

III. Complaint Record:

Each utility shall keep a record of all written complaints received from its consumers in regard to service, which record shall show the name and address of the complainant, the date and nature of the complaint, the action taken, and the date of final disposition of the matter. This record shall be kept as specified in Rule VI.

IV. Inspection of Equipment:

Each utility shall inspect its equipment and facilities, in accordance with good practice, and in a manner satisfactory to the Commission, and shall maintain a complete record of all such inspections and tests as specified in Rule VI.

V. Accidents:

Each utility shall keep a record of and shall furnish to the Investigator of Accidents for the Commission, in accordance with the rules of the Commission, reports of any and all accidents happening in or about or in connection with the operation of its property, facilities or service, wherein any person shall have been killed or injured, or property damaged or destroyed, with a full statement as far as possible of the causes of such accidents, and the precautions, if any, taken as prevention against future accidents of similar character.

VI. Records and Reports:

All records required by these rules shall be kept within the state, at an office or offices of the utility located in the territory

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served by it, and shall be open for examination by the Commission or its representative. Each utility shall notify the Commission of the office or offices at which the various classes of records are kept, and shall file with the Commission such reports as the Commission may from time to time require.

PART II.

METERS.*VII. Allowable Error:*

No condensation meter or hot water meter shall be placed in service nor allowed to remain in service, which has an error in registration of more than four (4%) per cent. when the water at its average temperature and standard test rate of flow is passing through the meter.

VIII. Periodic Tests:

No utility furnishing metered heating service shall allow a condensation meter to remain in service for a period longer than two years, or hot water meter to remain in service for a period longer than four years, without checking it for accuracy and readjusting it if found to be incorrect beyond the limits established by Rule VII.

IX. Meter Test Records:

Whenever a heating service meter is tested, the original test record shall be kept as specified in Rule VI. This record shall indicate the information necessary for identifying the meter, the reason for making the test, the reading of the meter before being disturbed, and the accuracy of the meter, together with all data taken at the time of the test. This record must be sufficiently complete to permit the convenient checking of the methods employed and the calculations made. A record shall also be kept, preferably numerically arranged, indicating date of meter purchase, when purchased after July 1, 1914, name of manufacturer, its size, its identification, its various places of installation with dates of installation and removal, and the dates and general results of all tests.

X. Installation of Meters:

Each heating service meter installed after July 1, 1914, shall have been tested for accuracy by the utility within one year

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previous to its installation. It shall also be inspected by the utility for proper connections, mechanical conditions, and suitability of location within sixty (60) days after installation.

XI. Facilities for Testing:

Each utility shall provide and maintain suitable and adequate facilities for testing its heating service meters, in each case to be satisfactory to and approved by the Commission. Each utility shall own a complete meter testing equipment of a form approved by the Commission. The accuracy of this testing equipment shall be established from time to time by a representative of the Commission at a place to be designated by it. After January 1, 1915, tests made with uncertified equipment will not be deemed authoritative.

XII. Meters in Service without Test Records.

All condensation meters in service on and after July 1, 1914, for which there is no record of test within two years, must be tested as soon thereafter as circumstances will permit, and in all cases within twelve months from July 1, 1914. All hot water meters in service on and after July 1, 1914, for which there is no record of test within four years, shall be tested as soon thereafter as circumstances will permit, and in all cases within twelve months from July 1, 1914.

XIII. Request Tests:

Each utility shall upon the written request of a consumer, and if he so desires, in his presence or that of his authorized representative, make a test of the accuracy of his meter. When a consumer desires, either personally or through a representative, to witness the testing of a meter, he may require the meter to be sealed in his presence before removal, which seal shall not be broken until the test is made in his presence. If the meter so tested shall be found to be accurate within the limits specified in Rule VII, a fee determined from the schedule indicated below shall be paid to the utility by the consumer requiring such test; but if not so found, then the cost thereof shall be borne by the utility furnishing the service. When making such request, the consumer shall agree to the basis of payment herein specified. A report of such test shall be made to the consumer, and a complete record of such shall be kept as specified in Rule VI. The amount of the fee shall be two dollars

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for each heating service meter having an outlet not exceeding one inch for hot water meters and an inlet not exceeding one inch for condensation meters; for other hot water meters having an outlet not exceeding two inches, the test fee shall be five dollars per meter. Rates for meters not included in the above classification, or which are so located that the cost is out of proportion to the fee specified will be furnished by the Commission upon receipt of complete specifications.

XIV. Refunds:

If a meter be found to be fast at any test by more than four (4%) per cent., an allowance or refund shall be made to the consumer by the utility, equal to all the excess charged the consumer, figured back from the date of test through the entire period of the current bill, unless it can be shown that the error is due to an accident or other cause the exact date of which can be determined, in which case it shall be figured back to such time.

RULES PERTAINING TO WATER SERVICE UTILITIES. PREPARED
BY PROF. L. H. HARRIS, UNIVERSITY OF PITTSBURGH, AND
PROF. R. H. FERNALD, UNIVERSITY OF PENNSYLVANIA.
ADOPTED APRIL 9, 1914.

NOTE.—Nothing contained in these rules shall be construed as relieving any utility from the performance of any of its legal duties to the public.

By order of THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF PENNSYLVANIA.

PART I.

GENERAL.*Definition:*

The term "utility" as used in these rules includes all public service companies, corporations and persons, as defined in The Public Service Company Law, engaged in the sale or distribution of water within the jurisdiction of the Commission.

I. Statutory:

"It shall be the duty of every public service company to furnish and maintain such service, including facilities, as shall

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in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees, and the public, and in conformity with such reasonable regulations or orders as may be made by the Commission."

II. Service Interruptions:

Each utility shall keep a record of all interruptions to service on the entire system or any portion thereof belonging to the utility, which record shall contain the time, cause, extent and duration of the interruption, and shall be kept as specified in Rule VI.

III. Complaint Record:

Each utility shall keep a record of all written complaints received from its consumers in regard to service, which record shall show the name and address of the complainant, the date and nature of the complaint, the action taken, and the date of final disposition of the matter. These records shall be kept as specified in Rule VI.

IV. Inspection of Equipment:

Each utility shall inspect its equipment and facilities, in accordance with good practice, and in a manner satisfactory to the Commission, and shall keep a complete record of all such inspections and tests as specified in Rule VI.

V. Accidents:

Each utility shall keep a record of and shall furnish to the Investigator of Accidents for the Commission, in accordance with the rules of the Commission, reports of any and all accidents happening in or about or in connection with the operation of its property, facilities or service, wherein any person shall have been killed or injured, or property damaged or destroyed, with a full statement as far as possible of the causes of such accidents, and the precautions, if any, taken as prevention against future accidents of similar character.

VI. Records and Reports:

All records required by these rules shall be kept within the state, at an office or offices of the utility located in the territory served by it, and shall be open for examination by the Commission or its representative. Each utility shall notify the Commission of the office or offices at which the various classes

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of records are kept, and shall file with the Commission such reports as the Commission may from time to time require.

PART II.

METERS.

VII. Allowable Error:

No water meter shall be placed in service nor allowed to remain in service, which has an error in registration of more than four (4%) per cent. when water is passing through it at approximately the following rates of flow:

$\frac{5}{8}$ inch meter,	6 gallons per minute;
$\frac{3}{4}$ inch meter,	10 gallons per minute;
1 inch meter,	20 gallons per minute;
$1\frac{1}{2}$ inch meter,	30 gallons per minute;
2 inch meter,	50 gallons per minute;
3 inch meter,	90 gallons per minute;
4 inch meter,	180 gallons per minute;
6 inch meter,	300 gallons per minute.

VIII. Periodic Tests:

No utility furnishing metered water service shall allow a water meter to remain in service for a period longer than, or for a registration greater than, that specified in the following table, without checking it for accuracy, and readjusting it if found to be incorrect beyond the limits established in Rule VII.

$\frac{5}{8}$ inch meter,	10 years or 100,000 cubic feet;
$\frac{3}{4}$ inch meter,	8 years or 150,000 cubic feet;
1 inch meter,	6 years or 300,000 cubic feet.

All meters above 1 inch, 4 years.

IX. Meter Test Records:

Whenever a water service meter is tested, the original test record shall be kept as specified in Rule VI, indicating the information necessary for identifying the meter, the reason for making the test, the reading of the meter before being disturbed, and the accuracy of the meter, together with all data taken at the time of the test. This record must be sufficiently complete to permit the convenient checking of the methods employed and the calculations made. A record shall also be kept, preferably numerically arranged, indicating date of meter purchase, when purchased after July 1, 1914, name of manu-

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facturer, its size, its identification, its various places of installation with dates of installation and removal, and the dates and general results of all tests.

X. Installation of Meters:

Each water service meter installed after July 1, 1914, shall have been tested for accuracy by the utility within one year previous to its installation. It shall also be inspected by the utility for proper connections, mechanical condition, and suitability of location within sixty (60) days after installation.

XI. Facilities for Testing:

Each utility shall provide and maintain suitable and adequate facilities for testing its water service meters, in each case to be satisfactory to and approved by the Commission. Each utility shall own a complete testing equipment of a form approved by the Commission. The accuracy of the testing equipment will be established from time to time by a representative of the Commission at a place to be designated by it. After January 1, 1915, tests made with uncertified equipment shall not be deemed authoritative.

XII. Meters in Service without Test Records:

All water meters in service on or after July 1, 1914, for which there is no record of test within five years, must be tested as soon thereafter as circumstances will permit, and in all cases within two years from July 1, 1914.

XIII. Request Tests:

Each utility shall upon the written request of a consumer, and if he so desires, in his presence or that of his authorized representative, make a test of the accuracy of his meter. When a consumer desires, either personally or through a representative, to witness the testing of a meter, he may require the meter to be sealed in his presence before removal, which seal shall not be broken until the test is made in his presence. If the meter so tested shall be found to be accurate within the limits herein specified, a fee determined from the schedule indicated below, shall be paid to the utility by the consumer requiring such test; but if not so found, then the cost thereof shall be borne by the utility furnishing the service. When making such request the consumer shall agree to the basis of payment herein specified. A report of such test shall be made

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to the consumer, and a complete record of such test shall be kept as specified in Rule VI. The amount of the fee shall be two dollars for each water service meter having an outlet not exceeding one inch; for other water service meters having an outlet not exceeding two inches, the test fee shall be five dollars per meter.

Rates for testing meters not included in the above classification, or which are so located that the cost is out of proportion to the fee specified, will be furnished by the Commission upon receipt of complete specifications.

XIV. Refunds:

If a meter be found to be fast at any test by more than four (4%) per cent., an allowance or refund shall be made to the consumer by the utility, equal to all the excess charged the consumer, figured back from the date of test through the entire period of the current bill, unless it can be shown that the error is due to an accident or other cause the exact date of which can be determined, in which case it shall be figured back to such time.

NOTICE.—This page will be reprinted in a later issue.



**Judge
George Kunkel**

**of the Court of Common Pleas
of Dauphin County**

CANDIDATE FOR

**Judge of the Supreme
Court of Pennsylvania**

APPENDIX B.

RECEPTION TO CHIEF JUSTICE FELL AND HIS ASSOCIATES BY THE ALLEGHENY COUNTY BAR ASSOCIATION.

D. T. Watson, Esq., acted as spokesman for the Allegheny County Bar and addressed the Chief Justice as follows:

Mr Chief Justice:

The Bar of Allegheny County realizes that your term as one of the Justices of the Supreme Court of Pennsylvania and as Chief Justice of the state will expire on December thirty-first of the current year. You are now presiding for the last time over the fall session of your court for the Western District.

We know that we will lose you as a judge, who for over twenty-one years has been an arbiter of legal controversies in our state. And many of us also lose you as a friend, whose yearly visit here gave us opportunity to know, admire and care for you.

Need I say how much we all regret this parting.

By our personal relations with you we came to know you as a man, whose meekness, sincerity and geniality endeared you to us. It may be that humility shines more in the retrospect, than in the immediate present; perhaps it is true that it is not a virtue that attracts the masses, eagerly pressing forward for life's prizes; and yet it is eternally true that it is an essential element in a character that makes up the total of a noble, conscientious man,—and you, sir, have it, as all men know.

Your sincerity and genial engaging manners attracted and endeared you to us, and those of us who know you the most intimately admire and care for you the more.

But our individual loss is magnified by that of the state. It, and all its people, in losing you, lose a judge who for so many years has, using Judge Story's language, faithfully ministered at the altar of justice. At the end of your long service on the bench in this great state, you can, without fear, repeat the language of the Great Law-Giver and Judge of Israel just before His death when He asserted, that He had never as a Judge wrested judgment, or respected persons, or taken a gift, however speciously it was disguised.

We testify that such an assertion by you would be true, and we now and here make it for you.

Reception to Chief Justice Fell and His Associates.

In the decision of any cause a personal element often unconsciously does enter into, and perhaps influences, the result. It may be a bias in favor of or against a certain class of persons; or in condemnation or approbation of the claim made or defense made in some certain class of cases; or for or against certain individuals; or the effect of the decision on some favored view of a current public question. That such bias, which does affect the conclusion should be as far as possible eliminated, is obvious to all.

Our common law is necessarily patchwork. Hundreds of years of hard work by very many learned and conscientious men by legislation and repeated decisions have produced it piece by piece. It is the wisdom of the ages. Admittedly, changing times require changes in the law, and the legislative department of government, as it often has in the past, can, and should, cautiously enact the remedy when the need thereof is apparent. This is in accord with our theory of government,—that the legislature shall make the law, the courts shall interpret the law, and the executive shall enforce it.

To adopt a rule which some seem now to favor, by which in any case the judge may disregard precedents and rule as the prevailing public sentiment seems to ask, or as he may himself think is on the whole advisable, is to center a most dangerous power in one or a few men, elected, it may be, for a long term of years or appointed for life. It makes almost useless the learning of the past; it increases the chance of bias in decisions; and in the end it bears most heavily and unfortunately upon the average man.

Please remark that I speak of precedents and principles used to arrive at a decision, and not of the mere rules of practice which all courts, from time to time, change as circumstances seem to require.

It is greatly to your credit, sir, that you have stood firm by the ancient ways. You sought in each of the cases before you to do right, and, to ascertain what the right was, you did as your predecessors for a hundred years have done,—used the appropriate tools to gain the desired end. From tangled facts, you elicited those which were material, and, applying to them the assured and tried principles and decisions of the law, you came to a just conclusion. You never thought that your own opinion of what should be done in any given case or any public clamor of the day should control, for you knew that to tread such a path unsettles the law and leads to favoritism and rank

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injustice. You were always loyal to your sacred duties as a judge.

Then you were so kindly and so fair in your great office as Chief Justice. You did enforce, as you had to, the rules of your court, but you did so in so kindly a manner that one blamed oneself and not you that he gave you cause to do so.

Pennsylvania has had many great Chief Justices, and this within the knowledge of some of us here present. Sharswood, Agnew, Mitchell, and Thompson are some of those, but no one of them left us more regretted than the bar now regrets your departure.

And now, sir, you see around you very many of those who in this county have for many years argued cases before you and you also see many of the judges of courts of original jurisdiction whose decisions you have reviewed. You miss, as we all do, some of those who were, in their day, among the ablest members of our bench and the bar. To name a few, I recall Judges Stowe, and Collier, and White, and Ewing, and Bailey, and Hawkins, and others, each so long upon the bench of Allegheny County; and of members of the bar I recall McCleave, and Rodgers, and Ferguson, and Miller, and Shoyer, and so many others. Each of them has passed over and it may be—I think is—quite appropriate to pause a moment to express our regard for them and our sorrow that they are not with us to-night.

We who remain, meet here to-night to do you honor—to testify, as we each truthfully can, that you yield up your great office with the thanks of the bar for the honest, able and conscientious manner you have fulfilled the duties of that high place. We respect you. We would, oh, so gladly, keep you, did not our fundamental law forbid.

As we must part, we now, one and all, salute you. We most earnestly wish you well. We know your ermine is unspotted, and we name you as an equal with the great Chief Justices of the past.

We wish you many years of health and prosperity.

In replying Chief Justice Fell paid a high compliment to the attorneys of the Allegheny County Bar, saying in part:

I appreciate most highly the honor done my colleagues and myself by the Allegheny County Bar Association and I am grateful for your kind expression of respect and good-will.

In the years that I have been with you I have formed a strong attachment to the Allegheny Bar. No bar in the state

Reception to Chief Justice Fell and His Associates.

has been more helpful to the court in its work. No bar has sustained a higher standard of professional conduct. The fairness and courtesy and consideration of its members in their relations to each other and to the court have made our intercourse most agreeable. In the mastery of the rare art of presenting causes clearly and concisely, of knowing what to say and how to say it and of quitting when done, your bar has had no equal.

With the present term of court I shall have ended nearly a half century of work in our profession, thirty-eight years of which will have been spent on the bench, twenty-one of them in part with you. During these years as I have passed from the junior bar to become the oldest in commission of the judges of the commonwealth, time has wrought many changes and over the retrospect are the commingled shades of light and of darkness, of sunshine and of shadow. At my own bar there are left but few men who were in practice when I entered it and there is no judge in Philadelphia who was in commission when I went on the Common Pleas bench. In Allegheny County I think there is but one judge who was in commission when I first met you in 1894, and there are now comparatively few members of your bar who were then in active practice in the Supreme Court. There has been no decadence in the bar or the bench. The men who have come upon the scene and on whom now rests the duty and the responsibility to secure the just and stable administration of the law, are fully equal in character and attainments to their predecessors. But I realize with sadness, and the thought has been quickened as I have noted the inroads that death has made in your ranks the past year, the truth that,

“As life runs on the road grows strange,
With faces new, and near the end,
The milestones into headstones change,
’Neath every one a friend.”

In giving up a work in which I have been so long engaged, my chief regret will be the severance of my closer personal and official relations with my colleagues, and with the bench and the bar of the state. They have been to me more than co-workers, they have been my friends, and it will be the breaking of endearing ties. Among my keenest regrets will be the parting with the bar of Allegheny County and of Western Pennsylvania.

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